Supreme Court, U.S.
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No. 96-

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN HOULIHAN, JOSEPH NARDONE, AND MICHAEL FITZGERALD,
PETITIONERS

v.

UNITED STATES,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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110 pp

QUESTIONS PRESENTED

I. Whether the petitioners' rights under the confrontation clause and the Federal Rules of Evidence were violated by the admission under a waiver-by misconduct theory of out-of-court statements to police.

II. Whether the lower court committed reversible error by retaining alternate jurors after deliberations began and by permitting the alternates and the deliberating jurors to eat together and socialize on a daily basis during the eleven days of jury deliberations, over petitioners' objections.

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No. 96-

In the Supreme Court
of the United States

October Term, 1996

John Houlihan, Joseph Nardone, and Michael Fitzgerald,
Petitioners

v.

United States,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

John Houlihan, Joseph Nardone, and Michael Fitzgerald hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit in this criminal case.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit (*App.* 1a-56a) is reported at *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 22, 1996. The petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on September 20, 1996. *App.* 90a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The pertinent part of Federal Rule of Criminal Procedure 24(c) provides:

> An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Federal Rule of Criminal Procedure 52(a) provides:

> **Harmless error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

Petitioners John Houlihan, Joseph Nardone, and Michael Fitzgerald were convicted of various RICO, drug and violent crimes in aid of racketeering offenses following a 70-day jury trial in the District of Massachusetts. The district court sentenced them to life in prison. The government presented evidence that Fitzgerald and Houlihan led an organization that distributed cocaine in the Charlestown section of Boston. According to the government, Nardone acted at the behest of Fitzgerald and Houlihan in committing a number of crimes of violence against competitors or suspected turncoats.

The out-of-court statements of George Sargent were critical to the government's case. Sargent was arrested on two occasions in early 1992 and was charged with drug trafficking offenses after police found him in possession of substantial quantities of cocaine. On both occasions, Sargent made statements to police officers while in custody which implicated Fitzgerald and Houlihan in drug distribution and suggested their responsibility for several recent killings. After giving statements to police, Sargent was released on low bail; he promptly ceased cooperating with police. The evidence established that Sargent was never asked to be a government witness, and never agreed to be a government witness. Sargent was killed in June 1992, a month after his second arrest. Over two years later, the defendants were indicted on drug, RICO, and violent crimes in aid of racketeering offenses. Among other charges, it was alleged that the defendants were responsible for Sargent's death. Trial commenced in October 1994 and concluded in March 1995. The district court, over the petitioners' objections, permitted police officers who had interrogated Sargent to testify about Sargent's statements made while he was in custody. The district court admitted excerpts of Sargent's statements into

evidence against Houlihan and Nardone on a waiver-by-misconduct theory -- they should not be allowed to profit by killing a potential witness against them. The district court's opinion on the issue is reported at *United States v. Houlihan*, 887 F. Supp. 352 (D. Mass. 1995); *App.* 57a-89a. Excerpts of a tape recording made by police while they interrogated Sargent in May 1992 were played for the jury during the government's case. The jury again heard the "voice from the grave" of George Sargent during the government's rebuttal closing argument.

The defendants contended that before the waiver-by-misconduct theory could be applied against them, the court had to find that Sargent was cooperating and that he would have been a government witness. The court rejected that argument and ruled that the statement could be admitted if the defendants killed Sargent either because he was cooperating or because they feared that he might cooperate in the future. The defendants also argued that all of the reported cases involved actual witnesses who had been rendered unavailable to the government literally on the eve of trial, whereas here there was not even an indictment pending against defendants at the time of Sargent's death. Finally, the petitioners argued that the government was unable to show that the statements of Sargent were reliable, pointing in particular to this Court's then-recent decision in *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431 (1994), about the inherent unreliability of custodial, non-self-incriminatory accusations The district court rejected those arguments, ruling that Houlihan and Nardone not only waived their rights to confrontation, but they also waived their right to object to the admission of hearsay on the basis of the Federal Rules of Evidence. Thus, the district court ruled that the reliability of Sargent's statements made to police officers while he was in custody was irrelevant.

The court of appeals affirmed, holding that the waiver-by-misconduct theory permits admission of the out-of-court statements so long as the defendant's misconduct is motivated by the desire to silence a potential witness, regardless of whether the person had agreed to testify.

When it submitted the case to the deliberating jurors for decision, the district court announced that it would not discharge the alternates. The defendants objected. The court overruled the objection and instead permitted the alternates to meet with the jurors each morning prior to the resumption of deliberations. The court further permitted the alternates to enter the deliberating room during breaks to retrieve snacks. The alternates and the deliberating jurors were taken to lunch together. Finally, they were reunited at the end of each court day. On one occasion, the foreperson wrote out a question for the court, requesting the transcripts of testimony of several key witnesses, while the alternates and deliberating jurors were together in the morning. The defendants objected to the continued contact between the alternates and deliberating jurors.

On appeal, the court of appeals agreed that the district court had violated Federal Rule of Criminal Procedure 24(c) by failing to discharge the alternates when the case was submitted to the jury. The court held, however, that the defendants had failed to show any prejudice and thus held the error to be harmless.

REASONS FOR GRANTING THE PETITION

1. This Court has not had occasion to consider whether unsworn, out-of-court statements of a non-testifying declarant may be admitted pursuant to the waiver-by-misconduct theory. Indeed, this Court's consideration of the waiver-by-misconduct theory is sparse. In *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 158 (1878), the Court affirmed a bigamy conviction in a case in which the district court had admitted the prior sworn testimony of the defendant's alleged second wife, based upon a finding that the defendant had acted improperly in refusing to disclose the whereabouts of his alleged second wife to the Marshal who was attempting to serve a subpoena on her. In the course of its decision, the Court observed, "[I]f a witness is absent by [the defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." In *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), the Court *in dicta*, observed, "no doubt the privilege may be lost by consent or at times even by misconduct." In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that a disruptive defendant, by his own misconduct, had waived his constitutional right to be present throughout his trial.

The lower courts have developed a body of caselaw, in conflict on several significant issues, holding that a defendant waives his right to object to the admission of out-of-court statements by a deceased or otherwise unavailable witness under a misconduct-by-waiver theory. Until the First Circuit's decision in this case, however, the caselaw had been limited to instances in which the witness was killed or otherwise rendered unavailable on the virtual eve of trial. *See, e.g., United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (one month prior to trial, witness backed out of testifying due to threats); *United States v. Mastrangelo*, 693

F.2d 269, 271 (2d Cir. 1982) (witness killed while on his way to the courthouse to testify at the trial of the defendant); *United States v. Thevis*, 665 F.2d 616, 623-24 (5th Cir.) *cert. denied* 459 U.S. 825 (1982) (witness killed after he testified before the grand jury but before he was scheduled to testify at trial); *United States v. Carlson*, 547 F.2d 1346, 1352-53 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (due to threats, witness backed out of testifying the day before trial was to commence). In the case at bar, the district judge admitted evidence of the deceased's custodial statements to police made over two years before the indictment was returned in this case.

Underlying the waiver-by-misconduct theory is the notion that a wrongdoer should not be permitted to profit by his misconduct. The First Circuit, however, by permitting the government to introduce Sargent's custodial statements, skipped a step by not requiring the government to prove that Sargent would have been a witness against them. If there is no evidence that Sargent would have been a witness against the defendants, then the defendants did not profit by their alleged misconduct.

In this case, moreover, the First Circuit sanctioned admission of the custodial statements even though the declarant had never agreed to testify for the government. Indeed, the declarant had never even been asked to testify for the government. In all of the other caselaw, the unavailable declarant had at least been determined to be a witness. Here, the First Circuit held that the failure of the government to prove that the declarant would be a witness was immaterial, so long as the government proved that the petitioners' motivation in killing decedent was to prevent him from possibly cooperating at some time in the future. Those courts of appeals which have ruled that the defendant's confrontation

clause rights may be waived by misconduct are in disagreement as to whether the waiver also removes the protections of the Federal Rules of Evidence. In *United States v. West*, 574 F.2d 1131, 1135 (4th Cir. 1978), and in *United States v. Carlson*, 547 F.2d at 1353-13, the courts held that the government had to meet the prerequisites enumerated in Federal Rules of Evidence 804(b)(5). Thus, those courts held that the government was required to meet the reliability standard enunciated in Rule 804(b)(5). The Second Circuit, *United States v. Thai*, 29 F.3d 785, 814 (2d Cir.), *cert. denied*, 115 S.Ct. 456 (1994); Fifth Circuit, *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); Tenth Circuit, *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); and now the First Circuit, have ruled that a waiver of the defendant's confrontation clause rights also operates as a waiver of his right to the protections of the Federal Rules of Evidence.

This reasoning, adopted by the First Circuit, is contrary to the Court's recent decision in *Williamson v. United States*, 512 U.S. 594, ___, 114 S.Ct. 2431, 2435 (1994). In *Williamson*, the Court narrowly construed Federal Rule of Evidence 804(b)(3) to exclude admission of a declarant's non-self-incriminatory statements under the statement against penal exception to the hearsay rule. In so ruling, the Court quoted approvingly from its earlier decision in *Lee v. Illinois*, 476 U.S. 530, 541 (1986):

> [T]he arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.

512 U.S. at ___, 114 S.Ct. at 2435. The Court in *Lee* described such statements as "presumptively suspect." 467 U.S. at 541. Indeed, the district judge in this case observed that there were strong reasons to doubt the reliability of the declarant, but nevertheless held that the reliability of his statements was a matter for the jury.

Here the statements were sorely lacking in reliability. First, they were given in an effort to secure the declarant's release from custody. Sargent was arrested with significant quantities of cocaine both times. On the first occasion, the police seized Sargent's car, and as a result of his statement, agreed to return it. He faced mandatory minimum sentences of a number of years. Second, they were given by someone who claimed to be an accomplice. Of course, accomplice testimony is viewed with such suspicion that the jury must be specifically alerted to the need for careful scrutiny. Third, the statements represented an effort to portray the declarant as a less significant drug dealer, and the defendants as large scale dealers who employed violence. Fourth, the officer who conducted the first interview, Metro Police Detective Mark Lemieux, made no report of the interview until January 31, 1994 (some two years later). His contemporaneously-made notes did not reflect a number of the more damning statements in his final report. Fifth, there were contradictions between the two statements. For instance, at the March interview, Sargent was asked about a homicide which had taken place four days earlier, but disclaimed any knowledge. In May, Sargent claimed that he spoke about the murder with Houlihan the day after the murder. Sixth, the declarant was not pressed to explain significant contradictions in either statement by the investigators. For example, Sargent claimed that he had a conversation with Houlihan the day after a March 2 killing, in which Houlihan said two more are "going to go." A moment later, when he is clearly referring to the

same supposed conversation with Houlihan, Sargent says that it took place *three hours before* a May killing. The killings in fact were separated by ten weeks. Seventh, Sargent tells police of his belief that another defendant had committed the May killing. Of course, the government's theory at trial was that the other defendant had nothing to do with the May killing. Eighth, Sargent gave a statement in May detailing the personnel in the organization. He never mentioned Nardone's name, even though the government's theory was that Nardone was the hit-man for the group. The statement of Sargent makes it seem like a different defendant was the hit-man. Ninth, the statements were not sworn, much less cross-examined. Tenth, the declarant had a lengthy criminal record. Eleventh, the statements are without detail and corroboration. The most incriminating parts are simply assertions that can never be tested; *i.e.*, "Houlihan told me that . . ."

Finally, the courts of appeals are in disagreement as to the standard of proof which the government must meet in order to satisfy the waiver-by-misconduct theory. In *Thevis*, 665 F.2d at 630-31, the court of appeals ruled that because of the vital nature of the confrontation and cross-examination rights at stake, the government had to meet a clear and convincing standard of proof. The court analogized the decision to this Court's earlier decision in *United States v. Wade*, 388 U.S. 218, 240 (1967) which holds that the government must demonstrate by clear and convincing evidence that an in-court identification of the defendant was based on the observations of the suspect at times other than the unnecessarily suggestive police lineup identification. On the other hand, the courts of appeals in the Second Circuit, *United States v. Aguiar*, 975 F.2d at 47; Sixth Circuit, *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), *cert. denied*, 460 U.S. 1053 (1983); and Tenth Circuit, *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied* 449 U.S. 840 (1980), have all

held that the preponderance of the evidence standard is adequate.

The Court should accept this case for review to bring order to the waiver-by-misconduct theory, as it has been developed by the courts of appeal.

2. Both the government and the First Circuit agreed with the petitioners' contention that the trial judge violated Rule 24(c) when he failed to discharge the alternate jurors after the case had been submitted to the deliberating jurors for a decision. The language of Rule 24(c) is clear. The petitioners' objections to the Court's decision to retain the alternates and to permit the alternates and the deliberating jurors to mingle during the eleven days of jury deliberations are also clear. What is less than clear is how the Court of Appeals determined that the error was harmless.[1/]

In *United States v. Olano*, 507 U.S. 725, 734 (1993), the Court explained that under Rule 52(a), it is the government which bears the burden of proving the absence of prejudice. Under Rule 52(b), the plain error standard which governed the *Olano* case, the burden is on the defendant to show that he was prejudiced. In the court below, the First Circuit, while intoning the teaching of *Olano* that the burden of demonstrating a lack of prejudice was on the government,

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[1/] The cases relied upon by the court of appeals in support of its decision are plain error cases. *See United States v. Sobamowo*, 892 F.2d 90, 96 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); *United States v. Ottersburg*, 76 F.3d 137, 139, *clarified*, 81 F.3d 657 (7th Cir. 1996). The court demonstrated its hostility to Rule 24(c) by observing that the rationale for Rule 24(c) "remains debatable." *App.* 21a.

failed to give meaning to that burden. Indeed, Justice Kennedy's concurrence in *Olano* suggests that in cases alleging a violation of Rule 24(c), it is virtually impossible for the party with the burden of proof to meet that burden, given the secretive nature of proceedings with the jury:

> If there were a case in which a specific objection had been made and overruled, the systemic cost resulting from the Rule 24(c) violation would likely be significant since it would seem to me most difficult for the government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a).

507 U.S. at 742

For many years, our courts have recognized the danger of contact between deliberating jurors and persons associated with the case. Thus, where there has been conversation between persons associated with a case and a deliberating juror, albeit not about the case on trial, courts have readily reversed. Conversations between deliberating jurors and persons associated with the case, including alternates who have not been discharged as required by the rule, are presumptively prejudicial. *Cabral v. Sullivan*, 961 F.2d 998, 1002 (1st Cir. 1992); *United States v. O'Brien*, 972 F.2d 12, 14 (1st Cir. 1992). This response is founded on the well-justified notion that even conversation about matters other than the case on trial may tend to influence the jury's deliberations. In this case, the jurors had been together for 70 trial days. The deliberations lasted for 11 days. Over objection, the alternates and deliberating jurors were permitted to meet in the morning before the jury was brought into the courtroom. Each day an alternate was allowed to enter the jury room and retrieve a platter of snacks during a

morning break during the deliberations. Each day, the deliberating jurors and alternates were taken to lunch by court officers. Each day, at the end of the day, the deliberating jurors and alternates were again dismissed together. It defies reason to pretend that none of this extensive contact bore any influence on the jury's deliberations.

This Court should accept this case for review in order to resolve the issue left open in *Olano* -- under what circumstances, and on what proof, can the government meet its burden to prove a lack of prejudice when the alternates are not discharged and when they are permitted to have regular, pervasive contact with the deliberating jurors. It is impossible for the government to meet its burden in this case because all of the conversations between the alternates and the deliberating jurors occurred off the record. In other words, the preserved error in this case is simply not amenable to harmless-error analysis. Unlike typical trial errors, this error did not "occur[] during the presentation of the case to the jury[.]" *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991); and this error, unlike the erroneous introduction of the confession in *Fulminante*, cannot be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless[.]" *Id.* at 308.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of *certiorari*.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1614

UNITED STATES OF AMERICA,
Appellee,
v.
JOHN HOULIHAN,
Defendant, Appellant.

No. 95-1615

UNITED STATES OF AMERICA,
Appellee,
v.
JOSEPH A. NARDONE
Defendant, Appellant.

No. 95-1675

UNITED STATES OF AMERICA,
Appellee,
v.
MICHAEL D. FITZGERALD
Defendant, Appellant.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Hon. William G. Young, U.S. District Judge

Before
Selya, Circuit Judge,
Campbell, Senior Circuit Judge,

and Boudin, Circuit Judge.

Charles W. Rankin, with whom Rankin & Sultan was on brief, for appellant Houlihan.

Jonathan Shapiro, with whom Angela Lehman and Stern, Shapiro, Weissberg & Garin were on brief, for appellant Nardone.

Kevin S. Nixon, with whom Robert Y. Murray and Ramsey & Murray were on brief, for appellant Fitzgerald.

Nina Goodman, Attorney, Dep't of Justice, with whom Donald K. Stern, United States Attorney, Paul V. Kelly and Frank A. Libby, Jr., Assistant United States Attorneys, and Daniel S. Goodman and David S. Kris, Attorneys, Dep't of Justice, were on brief, for the United States.

August 22, 1996

SELYA, Circuit Judge. These appeals present a hothouse of efflorescent issues set against a backdrop composed of roughly equal parts of drugs, money, and mayhem. Two of those issues — one implicating the Confrontation Clause and the other involving Fed. R. Crim. P. 24(c) — raise important questions of first impression in this circuit. In the pages that follow, we offer a skeletal outline of the case and then put flesh on the bones by addressing, first, the appellants' two flagship claims. We next consider a series of discovery disputes and conclude by discussing, albeit in a more abbreviated fashion, a laundry list of other asseverations. In the end, after careful consideration of the parties' arguments and close perscrutation of the compendious record, we affirm the judgments below in large

part, but reverse one defendant's conviction on three related counts and bring a contingent sentencing determination to closure.

I. BACKGROUND

Overcoming the temptation to engage in Homeric recitation of the riveting facts that emerged during a seventy-day trial, we opt instead to sketch the evidence at this juncture and reserve greater detail until the need arises to place specific issues into workable context. We draw our sketch in colors that coordinate with the jury's verdicts, consistent with record support. *See, e.g., United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992), *cert. denied*, 506 U.S. 1063 (1993).

For nearly four years Michael Fitzgerald and John Houlihan ran a ruthlessly efficient drug ring from an unlikely command post: Kerrigan's Flower Shop, Charlestown, Massachusetts. The organization commanded the allegiance of numerous distributors, stationary and mobile, including Jennierose Lynch, William "Bud" Sweeney, George Sargent, and Alan Skinner. These minions, and others like them, helped the organization supply cocaine to hordes of buyers through an elaborate street-level distribution network that arranged most of its sales with the aid of electronic pagers, assigned customer codes, and preset rendezvous points.

Fitzgerald and Houlihan imposed a strict code of silence on all who came into contact with them, including their own troops. They dealt severely with persons who seemed inclined to talk too freely. Joseph Nardone, a professional assassin who bragged that he was the "headache man" — when the organization's chieftains had a headache, Nardone got rid of it — acted as the principal enforcer. Over time, the gang's targets included Sargent, Sweeney (who survived multiple attempts on his life, but was left paralyzed from the

chest down), a rival drug dealer, James Boyden III, and the latter's son and helpmeet, James Boyden IV.

The Fitzgerald-Houlihan axis dominated the Charlestown scene through 1993. Ultimately, the authorities broke the code of silence and a federal grand jury indicted twelve individuals (including Fitzgerald, Houlihan, and Nardone) on a myriad of charges.[1/] After trial, the two ringleaders and their enforcer were found guilty of engaging in a racketeering enterprise (count 1), racketeering conspiracy (count 2), conspiracy to commit murder in aid of racketeering (counts 5, 7 & 9), and conspiracy to distribute cocaine (count 20). *See* 18 U.S.C. §§ 1962(c) & (d), 1959(a); 21 U.S.C. § 846. The jury also convicted Fitzgerald and Houlihan of aiding and abetting murder and attempted murder in aid of racketeering (counts 6, 8, 11 & 12), instigating murder for hire (counts 15, 16 & 17), engaging in a continuing criminal enterprise (count 19), and distributing cocaine (counts 21 through 29). *See* 18 U.S.C. §§ 1959(a), 1958; 21 U.S.C. §§ 848, 841(a)(1). The jury found Nardone guilty of murder and attempted murder in aid of racketeering (counts 6, 8, 11 & 12), *see* 18 U.S.C. § 1959(a), and using and carrying a firearm during and in relation to crimes of violence (counts 39, 40, 42 & 43), *see* 18 U.S.C. § 924(c). The jury also returned special forfeiture verdicts. *See* 18 U.S.C. § 1963; 21 U.S.C. § 853. The district court sentenced each defendant to multiple terms of life imprisonment. These appeals blossomed.

II. THE VOICE FROM THE GRAVE

[1/] Of these twelve, only Fitzgerald, Houlihan, and Nardone appear as appellants before us. Three of their codefendants (Skinner, Lynch, and Joseph Houlihan) eventually pled guilty; five others were granted a separate trial; and one (William Herd) was acquitted by the same jury that convicted the three appellants.

The district court admitted over objection portions of hearsay statements made by George Sargent on the theory that Sargent's murder constituted a waiver of the Confrontation Clause vis-à-vis the murderers.[2/] Houlihan and Nardone assign error to this order and to a salmagundi of related rulings.

A. Setting the Stage.

Sargent served as a distributor for the Fitzgerald-Houlihan organization. The police arrested him twice during 1992 on drug-trafficking charges. Both times, Sargent made voluntary statements that inculpated Fitzgerald and Houlihan in a sprawling drug conspiracy and tended to link them with several murders. The statements also furnished evidence probative of the elements of the offenses with which Nardone had been charged, but Sargent did not mention him by name. On June 28, 1992 — within a month after he gave the second statement — Sargent was ambushed outside his dwelling and was shot several times. He died as a result.

The government filed a pretrial motion for an order (1) authorizing a state trooper, Mark Lemieux, to testify about Sargent's statements following his March 1992 arrest, and (2) permitting the jury to hear a redacted version of the taped May 1992 interview conducted by Boston police detectives following Sargent's second arrest. The government argued that the appellants — who had been charged with Sargent's murder — waived their rights to object to the admission of his out-of-court statements on either Confrontation Clause or

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[2/] Because the government did not prove to the district court's satisfaction that Fitzgerald shared his codefendants' intent to forestall Sargent from cooperating with the police, the court ruled that Sargent's statements could not be used against Fitzgerald. The correctness of that ruling is not before us.

hearsay grounds when they successfully conspired to execute him for the express purpose of preventing his cooperation with the authorities. The district court took the motion under advisement and, near the end of the government's case in chief, admitted the challenged evidence against Houlihan and Nardone, but not Fitzgerald, *see supra* note 2, concluding that the government had shown by clear and convincing evidence that those defendants conspired to kill Sargent at least in part for the purpose of preventing him from cooperating with the police, and that such actions were tantamount to a knowing waiver of their confrontation rights. *See United States v. Houlihan*, 887 F. Supp. 352, 363-65 (D. Mass. 1995).[3/]

B. Waiver by Homicide: The Confrontation Clause.

To resolve Houlihan's and Nardone's main objections, we must decide whether a defendant waives his rights under the Confrontation Clause by murdering a potential witness to prevent that witness from turning state's evidence and/or testifying against him at trial. We believe that he does.

It is apodictic that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI. This trial right is designed to assure defendants of a meaningful opportunity to cross-examine the witnesses who testify against them, *see, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *United States v. Laboy-Delgado*, 84 F.3d 22, 28 (1st Cir. 1996), thereby enhancing the jury's ability to separate fact from fiction.

Though the Confrontation Clause is a cornerstone of our

[3/] The district court also published a preliminary opinion, *United States v. Houlihan*, 871 F. Supp. 1495 (D. Mass. 1994), which is of little moment in regard to these appeals.

adversary system of justice, it is not an absolute; there are circumstances in which the prosecution may introduce an unsworn out-of-court statement without procuring the declarant's presence at trial. *See, e.g., Puleio v. Vose*, 830 F.2d 1197, 1205-07 (1st Cir. 1987) (discussing exception for spontaneous exclamations), *cert. denied*, 485 U.S. 990 (1988). Moreover, a defendant may waive his right to confrontation by knowing and intentional relinquishment. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that a guilty plea is an express waiver of the constitutional right to confrontation); *see also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). While a waiver of the right to confront witnesses typically is express, the law is settled that a defendant also may waive it through his intentional misconduct. *See, e.g., Taylor v. United States*, 414 U.S. 17, 20 (1973) (finding such a waiver when a defendant boycotted his trial); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (ruling that a defendant waives the right to confrontation by engaging in disruptive behavior requiring his removal from the courtroom during the trial).

By the same token, courts will not suffer a party to profit by his own wrongdoing. Thus, a defendant who wrongfully procures a witness's absence for the purpose of denying the government that witness's testimony waives his right under the Confrontation Clause to object to the admission of the absent witness's hearsay statements. *See Reynolds v. United States*, 98 U.S. (8 Otto) 145, 158 (1878) (holding that the defendant's refusal to disclose the whereabouts of a witness constituted such a waiver); *Steele v. Taylor*, 684 F.2d 1193, 1201-02 (6th Cir. 1982) (holding that a defendant who silences a witness by exploiting an intimate relationship waives the right to confrontation), *cert. denied*, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (concluding that a defendant waives his confrontation

right by threatening a witness's life and bringing about the witness's silence), *cert. denied*, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358-60 (8th Cir. 1976) (similar), *cert. denied*, 431 U.S. 914 (1977). Moreover, it is sufficient in this regard to show that the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's *sole* motivation. *Cf. United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990) (stating that the obstruction of justice statute, 18 U.S.C. § 1503, requires proof that the defendant's conduct was "prompted, at least in part," by the requisite corrupt motive).

Houlihan and Nardone argue, however, that the waiver-by-misconduct doctrine, even if good law, should not be employed here because Sargent was not an *actual* witness — no charges had been lodged against Houlihan or Nardone at the time of Sargent's murder, and no grand jury had as yet been convened — but at most a turncoat cooperating with the police. Thus, they could not have been on notice that they were waiving a trial right. We find this argument unpersuasive. Although the reported cases all appear to involve actual witnesses, *see, e.g.*, *United States v. Thai*, 29 F.3d 785, 798 (2d Cir.), *cert. denied*, 115 S. Ct. 456 & 496 (1994); *United States v. Mastrangelo*, 693 F.2d 269, 271-72 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984), we can discern no principled reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a *potential* witness.

When a defendant murders an individual who is a percipient witness to acts of criminality (or procures his demise) in order to prevent him from appearing at an upcoming trial, he denies the government the benefit of the witness's live testimony. In much the same way, when a

defendant murders such a witness (or procures his demise) in order to prevent him from assisting an ongoing criminal investigation, he is denying the government the benefit of the witness's live testimony at a future trial. In short, the two situations are fair congeners: as long as it is reasonably foreseeable that the investigation will culminate in the bringing of charges, the mere fact that the homicide occurs at an earlier step in the pavane should not affect the operation of the waiver-by-misconduct doctrine. Indeed, adopting the contrary position urged by the appellants would serve as a prod to the unscrupulous to accelerate the timetable and murder suspected snitches sooner rather than later. We see no justification for creating such a perverse incentive, or for distinguishing between a defendant who assassinates a witness on the eve of trial and a potential defendant who assassinates a potential witness before charges officially have been brought. In either case, it is the intent to silence that provides notice.

We therefore hold that when a person who eventually emerges as a defendant (1) causes a potential witness's unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial, then the defendant waives his right to object on confrontation grounds to the admission of the unavailable declarant's out-of-court statements at trial.

Before applying this holding to the case at hand, we must correctly calibrate the quantum of proof. The lower court, paying obeisance to *United States v. Thevis*, 665 F.2d 616, 629-30 (5th Cir. Unit B), *cert. denied*, 456 U.S. 1008 (1982), adopted the minority view and decided that the government must prove the predicate facts essential to the waiver by "clear and convincing" evidence. *Houlihan*, 887 F. Supp. at 360. This sets too high a standard. Unlike the Fifth Circuit,

we think that the government need only prove such predicate facts by a preponderance of the evidence.

The *Thevis* court compared the waiver-by-misconduct problem to the admissibility of in-court identifications that follow tainted out-of-court identifications. *See, e.g., United States v. Wade*, 388 U.S. 218, 240 (1967) (requiring government to prove by "clear and convincing" evidence in such circumstances that the proposed in-court identification has a reliable independent basis). With respect, we believe the better comparison is to the admission of out-of-court statements under the coconspirator exception to the hearsay rule. *See* Fed. R. Evid. 801(d)(2)(E). To invoke the coconspirator exception, the proponent of the statement must "show by a preponderance of the evidence" certain predicate facts, namely, "that a conspiracy embracing both the declarant and the defendant existed, and that the declarant uttered the statement during and in furtherance of the conspiracy." *United States v. Sepulveda*, 15 F.3d 1161, 1180 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 2714 (1994); *see also Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

Proving the conditions precedent to the applicability of the coconspirator exception is analytically and functionally identical to proving that a defendant's wrongdoing waives his rights under the Confrontation Clause. *See Steele*, 684 F.2d at 1203; *United States v. White*, 838 F. Supp. 618, 624 (D.D.C. 1993). We therefore align ourselves with the majority of federal appellate courts that have considered the question, *see, e.g., Mastrangelo*, 693 F.2d at 273; *Steele*, 684 F.2d at 1202-03; *Balano*, 618 F.2d at 629, and set the government's burden of proof at the preponderance-of-the-evidence level.

Measured against this more conventional benchmark, the district court's findings easily pass muster. The record amply

demonstrates that Houlihan and Nardone knew when they conspired to murder Sargent that they were depriving the government of a potential witness. First, the district court supportably found that they believed Sargent was cooperating with the police and could harm them and the organization by talking.[4/] *See Houlihan*, 887 F. Supp. at 363-64. Second, Sargent was in fact cooperating with law enforcement officials at the time and made two voluntary statements in which he provided detailed accounts of the organization's modus operandi, descriptions of the principals' roles in various murders, and a frank admission of his own involvement in the conspiracy. While the defendants' perception of likely cooperation may well be enough to meet this prong of the test, the fact of Sargent's cooperation reinforces the inference that the killers believed Sargent was spilling the beans and murdered him on that account. Last but not least, the conspirators knew to a certainty that Sargent had keen insight into their felonious activities both from his own work in the distribution network and from sundry conversations in which they spoke openly to him — in retrospect, too openly — of their participation in serious crimes.

This evidentiary foundation sturdily supports the conclusion that Houlihan and Nardone reasonably could have foreseen Sargent becoming a witness against them and plotted to kill him in order to deprive the government of his firsthand testimony. Hence, the district court did not err in overruling objections to the introduction of portions of Sargent's out-of-court statements insofar as those objections stemmed from the

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[4/] It is noteworthy that, after Judge Young ruled on the admissibility of Sargent's statements, Sweeney testified that Houlihan told him, flat out, that Sargent had been killed because he "was talking to the cops."

Confrontation Clause.[5/]

C. Waiver by Homicide: The Hearsay Objections.

Houlihan and Nardone next argue that, even if they waived their confrontation rights, the district court should not have admitted Sargent's hearsay statements because they were tinged with self-interest (having been made in police custody with a stiff sentence for distributing large quantities of narcotics in prospect) and therefore lacked "circumstantial guarantees of trustworthiness." Fed. R. Evid. 804(b)(5). On the facts of this case, we agree with the district court, *see Houlihan*, 887 F. Supp. at 362, 367, that Houlihan's and Nardone's misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous.

The Supreme Court has yet to plot the crossroads at which the Confrontation Clause and the hearsay principles embedded in the Evidence Rules intersect. The question is subtly nuanced. Though the two bodies of law are not coterminous, they husband essentially the same interests. *See California v. Green*, 399 U.S. 149, 155-56 (1976). Both attempt to strike a balance between the government's need for probative evidence and the defendant's stake in testing the government's case through cross-examination. *See Ohio v. Roberts*, 448 U.S. 56, 65 (1980). As a result, whether

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[5/] In a related vein, Houlihan and Nardone complain that the district court failed to conduct an evidentiary hearing prior to ruling on the admissibility of Sargent's statements. This complaint strikes us as a thinly-veiled effort to rehash a discovery dispute that we discuss *infra* Part IV(B). In all events, the district court heard arguments of counsel and thirty-seven days of trial testimony before deciding that the statements could be utilized. In these circumstances, the court did not outstrip the bounds of its discretion in declining to convene a special mid-trial evidentiary hearing.

hearsay principles are more or less protective of a defendant's right to cross-examination than confrontation principles depends on the point at which the balance is struck in any particular instance (recognizing, however, that the balance can be struck at different levels in different cases). *See Green*, 399 U.S. at 156.

In this case, we can take matters a step further. In constructing the balance the main interest that must be offset against the government's need for evidence is the accused's right to confrontation (for this is the right from which the right to cross-examine springs). Once the confrontation right is lifted from the scales by operation of the accused's waiver of that right, the balance tips sharply in favor of the need for evidence. *See Thai*, 29 F.3d at 841 (holding that a defendant who waives his confrontation right by wrongfully procuring a witness's silence also waives hearsay objections vis-à-vis that witness); *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (similar); *see also Steele*, 684 F.2d at 1201 (noting that "English and American courts have consistently relaxed the hearsay rule when the defendant wrongfully causes the witness' unavailability"). Here, then, inasmuch as Houlihan and Nardone waived their confrontation right by colloguing to murder Sargent, they simultaneously waived their right to object on hearsay grounds to the admission of his out-of-court statements.[6] Hence, the district court appropriately

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[6] We caution that a waiver of confrontation rights does not result in the automatic surrender of all evidentiary objections. For example, a district court still should exclude relevant but highly inflammatory evidence, misconduct notwithstanding, if the danger of unfair prejudice substantially outweighs the evidence's probative value. *See* Fed. R. Evid. 403. Presumably, such evidence would have been excludable on a non-hearsay ground if the declarant were available to testify, so there is no

(continued...)

eschewed the request for findings under Fed. R. Evid. 804(b)(5).

Houlihan and Nardone have a fallback position. They suggest that the district court's admission of Sargent's out-of-court statements violated their rights to due process because the admissions allowed them to be convicted on the basis of unreliable evidence. *See Green*, 399 U.S. at 163 n.15 (ruminating that "considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking"). We reject this initiative. Whatever criticisms justifiably might be levelled against Sargent's statements, the portions of those statements that Judge Young allowed into evidence are not so unreliable as to raise due process concerns. Other evidence abundantly corroborates (and in many instances replicates) Sargent's account. For instance, his description of the organization's modus operandi and his assessment of Houlihan's leadership role were confirmed and described in excruciating detail by a galaxy of live witnesses (e.g., Michael Nelson, Bud Sweeney, Cheryl Dillon).[7] No more is exigible.

D. The Redactions.

After ruling that portions of Sargent's out-of-court

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[6](...continued)

reason to admit it when the defendant procures the declarant's unavailability.

[7] Perhaps the weakest link in the chain is Sargent's statement regarding a suggestive but ambiguous conversation that he had with Houlihan shortly before the killing of James Boyden III. But this tale is relevant principally to the three counts against Houlihan on which we order his convictions reversed. *See infra* Part V(B). Thus, any error in admitting it is harmless.

statements were admissible against Houlihan and Nardone, the court limited the May 30, 1992 statements to those that "would have been competent and admissible evidence had the declarant been able to testify in person," and also excluded those portions that "directly or through innuendo" might offend the rule of *Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding that the introduction at a joint trial of a nontestifying defendant's statements that implicate a codefendant constitutes prejudicial error). *Houlihan*, 887 F. Supp. at 365. Houlihan and Nardone objected, contending that the editing process heightened the force of Sargent's statements, and that if the interviews were to be introduced at all, then the entire text should be fair game. The district court overruled the objections.

On appeal, Houlihan and Nardone argue less that Sargent's statements should have been redacted somewhat differently and more that they should not have been redacted *at all*.[8] They assert that when a defendant waives his rights to make Confrontation Clause and hearsay objections through misconduct, the absent declarant's full out-of-court statement should be admissible at the behest of either the proponent or opponent of the statement. This assertion rests on a misguided notion.

The cardinal purpose of the waiver-by-misconduct doctrine is to ensure that a wrongdoer does not profit in a court of law by reason of his miscreancy. By murdering Sargent, Houlihan and Nardone denied the prosecution the

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[8] Though the district court applied the same redaction principles to the police officer's testimony concerning the March interview (which was not recorded or transcribed) and the tape-recorded May interview, the emphasis on appeal is on the latter. While we restrict our discussion to that recording, our holding applies with equal force to the earlier debriefing.

benefit of his live testimony. To compensate for that denial the court allowed the government to introduce portions of the interviews that Sargent gave to the police. The defense, however, was not entitled to any compensation, and permitting it to introduce additional hearsay statements (apart from statements necessary to place the portions used by the government into context and to render them not misleading) would be to reward bloodthirstiness. We decline to stamp a judicial imprimatur on a calculated murder. Thus, we hold that a homicidal defendant may by his misconduct waive his hearsay objections, but that waiver does not strip the government of its right to lodge hearsay objections. It is only the party who wrongfully procures a witness's absence who waives the right to object to the adverse party's introduction of the witness's prior out-of-court statements. *See White*, 838 F. Supp. at 625; *see also Steele*, 684 F.2d at 1202.

To sum up, since courts should not reward parties for their own misdeeds, a prior out-of-court statement made by a witness whose unavailability stems from the wrongful conduct of a party, aimed at least in part at achieving that result, is admissible against that party as long as the statement would have been admissible had the witness testified. But the party who causes the witness's unavailability is not entitled to the same prophylaxis. Consequently, under settled jurisprudence governing totem-pole hearsay, *see* Fed. R. Evid. 805, the tape of Sargent's interview itself constituted first-level hearsay not within any recognized exception, and the district court did not err in admitting some portions at the government's urging and refusing to admit the rest of the recording at the appellants' behest.

Houlihan and Nardone offer a second reason why the trial court erred in excluding the balance of Sargent's statements. This construct pivots on Evidence Rule 106, a rule that

codifies principles of fairness and completeness.[9/] Under it, a party against whom a fragmentary statement is introduced may demand that the rest of the statement (or so much thereof as is appropriate) be admitted into evidence in order to place the excerpt in context.

It is readily evident that, as the appellants maintain, Rule 106 can serve its proper function only if the trial court from time to time is prepared to permit the introduction of some otherwise inadmissible evidence. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986). Be that as it may, completeness, like beauty, is frequently in the eye of the beholder. The trial court is in the best position to assess the competing centrifugal and centripetal forces that bear on this calculus. Thus, when the trial court, acting in its discretion, finds that proffered excerpts, standing on their own, are not misleading, its judgment is entitled to great respect. *See United States v. Boylan*, 898 F.2d 230, 256-57 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990). So it is here.

Houlihan and Nardone dwell on incompleteness primarily because Judge Young declared two sets of comments inadmissible. (1) Sargent told the police, *inter alia*, that James Boyden IV was selling drugs in Lynch's territory; that Fitzgerald warned him and had him beaten, but to no avail; and that he then told Sargent that he would "just have to kill" the interloper. Claiming that Fitzgerald's remarks to Sargent provided Fitzgerald with a different motive to murder

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[9/] The rule provides in pertinent part:

> When a . . . recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part . . . which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106.

Sargent, Houlihan sought to have this part of Sargent's statement admitted into evidence. Houlihan claims that omitting references to Fitzgerald's involvement in the murder made it appear that he, rather than Fitzgerald, was the mastermind responsible for that crime. (2) In a similar vein, Nardone claims that the court's refusal to permit him to introduce references in the interviews to Herd's putative involvement in the Boydens' killings made it appear that Nardone carried out those murders single-handed.

The court found that these incremental excerpts were "segregable" from the portions of the interviews that the government had proffered and denied the appellants' requests to admit them. *Houlihan*, 887 F. Supp. at 366. In assessing the court's rulings, three facts are worthy of note: (1) the interview segments admitted into evidence contained no explicit reference whatever to the Boydens' murders; (2) neither Houlihan nor Nardone were charged with the slaying of James Boyden IV; and (3) Sargent never mentioned Nardone by name anywhere in the course of either debriefing. Bearing these facts in mind, we conclude that the lower court acted within the realm of its discretion in refusing to invoke Rule 106.

Houlihan and Nardone also claim that the court should have admitted other portions of Sargent's interviews to impeach his credibility. *See* Fed. R. Evid. 806 (providing that the credibility of a hearsay declarant "may be attacked . . . by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness"). The district court rejected this claim because it found the additional excerpts "too convoluted, collateral, or cumulative to be admitted." *Houlihan*, 887 F. Supp. at 368. Having reviewed the items, we discern no error in their exclusion.

Trial courts have considerable leeway in imposing outside

limits on cross-examination. *See Van Arsdall*, 475 U.S. at 679; *Laboy-Delgado*, 84 F.3d at 28. Here, the record demonstrates that the appellants had a full and fair opportunity during their cross-examination of the officers who interviewed Sargent to cast doubts upon his veracity. They made the most of this opportunity.[10/] By contrast, the extra material that the appellants wished to introduce lacked genuine impeachment value and promised to add virtually nothing of consequence to the grueling cross-examination. Thus, we cannot fault the district court for excluding this exiguous material. *See Van Arsdall*, 475 U.S. at 679 (stating that cross-examination appropriately may be limited if redundant or marginally relevant); *Boylan*, 898 F.2d at 255-56 (similar).

To say more would be supererogatory. Because our painstaking review of the record reveals no solid grounding for the claim that the district court flouted Rule 106 in any respect, we refuse to meddle.

E. Prejudicial Spillover.

There is one last leg to this phase of our journey. Fitzgerald alleges that the admission of Sargent's statements resulted in unfair prejudice to him. The record reveals none.

Because the prosecution must show the existence of a conspiracy to prove a conspiracy charge, evidence implicating one coconspirator is likely to be directly relevant to the charges against his codefendants. *See United States v.*

[10/] For example, during cross-examination of Detective Harris (who taped and testified about the May 1992 interview), the appellants showed that Sargent had a lengthy criminal record; that he gave up his confreres while facing the possibility of a fifteen-year mandatory minimum sentence for drug trafficking; and that he had been promised low bail, among other things, in exchange for cooperation.

O'Bryant, 998 F.2d 21, 26 (1st Cir. 1993). Even if it is not, mistrials grounded on spillover prejudice are rare. As long as the district court limits the admission of the challenged evidence to a particular defendant or defendants, the other defendants cannot rewardingly complain unless the impact of the evidence is so devastating that, realistically, instructions from the bench cannot be expected to repair the damage. *See Sepulveda*, 15 F.3d at 1184.

Silhouetted against this set of rules, the flimsiness of Fitzgerald's claim comes into bold relief. What excites the emotions in one case may be routine evidence in another case. The material distilled from Sargent's statements — which would have stood out like a sore thumb in a prosecution rooted in the relative gentility of white-collar crime — does not seem especially sensational when evaluated in light of the other, plainly admissible evidence that permeated this seventy-day saga of nonstop violence. Moreover, the district court instructed the jurors on the spot that they were not to consider Sargent's statements in deciding Fitzgerald's fate. To complement that directive, the court redacted all references to Fitzgerald from the portions of those statements that the jury heard, and it repeated its prophylactic instruction on several occasions. Under these circumstances, the presumption that jurors follow the court's instructions is intact. Ergo, Fitzgerald suffered no unfair prejudice.

III. ALTERNATE JURORS

The appellants calumnize the district court because, despite their repeated objections, the court refused to discharge the alternate jurors once deliberations commenced and compounded its obduracy by allowing the alternate jurors to have intermittent contact with the regular jurors during the currency of jury deliberations. This argument requires us to

address, for the first time, the interplay between violations of Fed. R. Crim. P. 24(c) and the applicable test for harmless error.

The imperative of Rule 24(c) is clear and categorical: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Fed. R. Crim. P. 24(c). The rule reflects the abiding concern that, once a criminal case has been submitted, the jury's deliberations shall remain private and inviolate.[11/] *See United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Here, the appellants' claim of error is well founded. Rule 24(c) brooks no exceptions, and the district court transgressed its letter by retaining the alternate jurors throughout the deliberative period. The lingering question, however, is whether the infraction requires us to invalidate the convictions. The appellants say that it does. In their view, a violation of Rule 24(c) automatically necessitates a new trial where, as here, the defendants preserved their claim of error, or, at least, the continued contact between regular and alternate jurors that transpired in this case demands that result. The government endeavors to parry this thrust by classifying the error as benign. We find that the Rule 24(c) violation caused no cognizable harm, and we deny relief on that basis.

The watershed case in this recondite corner of the law is

[11/] Notwithstanding that Criminal Rule 23(b) permits the remaining eleven jurors to return a valid verdict if a deliberating juror is excused for cause, the wisdom of Rule 24(c) remains debatable. We can understand a district judge's reluctance, following a long, complicated, and hotly contested trial, to release alternate jurors before a verdict is obtained. But courts, above all other institutions, must obey the rules.

United States v. Olano, 507 U.S. 725 (1993). There the trial court permitted alternate jurors, while under instructions to refrain from engaging personally in the deliberative process, to remain in the jury room and audit the regular jurors' deliberations. *See id.* at 727-29. The jury found the defendants guilty. The court of appeals, terming the presence of alternate jurors in the jury room during deliberations "inherently prejudicial," granted them new trials although they had not lodged contemporaneous objections. *United States v. Olano*, 934 F.2d 1425, 1428 (9th Cir. 1991). The Supreme Court demurred. It noted that unless an unpreserved error affects defendants' "substantial rights," Fed. R. Crim. P. 52(b), the error cannot serve as a fulcrum for overturning their convictions. 507 U.S. at 737. The Court then declared that the mere "presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." *Id.* Instead, the critical inquiry is whether the presence of the alternates in the jury room during deliberations actually prejudiced the defendants. *See id.* at 739.

The Justices conceded that, as a theoretical matter, the presence of any outsider, including an alternate juror, may cause prejudice if he or she actually participates in the deliberations either "verbally" or through "body language," or if his or her attendance were somehow to chill the jurors' deliberations. *Id.* The Court recognized, however, that a judge's cautionary instructions to alternates (e.g., to refrain from injecting themselves into the deliberations) can operate to lessen or eliminate these risks. *See id.* at 740 (remarking "the almost invariable assumption of the law that jurors follow their instructions") (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). Thus, absent a "specific showing" that the alternates in fact participated in, or otherwise chilled, deliberations, the trial court's instructions to the alternates not

to intervene in the jury's deliberations precluded a finding of plain error. *Id.* at 741.

This case presents a variation on the *Olano* theme. Here, unlike in *Olano*, the appellants contemporaneously objected to the district court's retention of the alternate jurors, thus relegating plain error analysis to the scrap heap. This circumstance denotes two things. First, here, unlike in *Olano*, the government, not the defendants, bears the devoir of persuasion with regard to the existence *vel non* of prejudice. Second, we must today answer the precise question that the *Olano* Court reserved for later decision. *See id.* Withal, the framework of the inquiry in all other respects remains the same. *See id.* at 734 (noting that, apart from the allocation of the burden of proof, a claim of error under Fed. R. Crim. P. 52(b) ordinarily requires the same type of prejudice-determining inquiry as does a preserved error). We do not discount the significance of this solitary difference, *see, e.g.*, *id.* at 742 (Kennedy, J., concurring) (commenting that it is "most difficult for the Government to show the absence of prejudice"), but "difficult" does not mean "impossible." Since *Olano* teaches that a violation of Rule 24(c) is not reversible error per se,[12] *see id.* at 737, we must undertake a particularized inquiry directed at whether the instant violation, in the circumstances of this case, "prejudiced [the defendants], either specifically or presumptively." *Id.* at 739.

Our task, then, is to decide if the government has made a sufficiently convincing case that the district court's failure to observe the punctilio of Rule 24(c) did not affect the verdicts. *See, e.g., id.* at 734; *Kotteakos v. United States*, 328 U.S. 750, 758-65 (1946). In performing this task, we find the Court's

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[12] On this score, *Olano* confirmed what this court anticipated. *See United States v. Levesque*, 681 F.2d 75, 80-81 (1st Cir. 1982) (dictum).

reasoning in *Olano* instructive. *Cf. Lee v. Marshall*, 42 F.3d 1296, 1299 (9th Cir. 1994) (finding *Olano* Court's reasoning transferable to harmless error analysis in habeas case). The risks that were run here by retaining the alternates were identical to the risks that were run at the trial level in *Olano*,[13] and the district judge's ability to minimize or eliminate those risks was the same in both situations.

The operative facts are as follows. Although the district court retained the alternates, subsequent physical contact between them and the regular jurors occurred only sporadically — confined mostly to the beginning of each day (when all the jurors assembled prior to the commencement of daily deliberations) and lunch time (when court security officers were invariably present).[14] Judge Young at no time

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[13] In one respect, treating this case as comparable to *Olano* tilts matters in the appellants' favor. There, the undischarged alternates actually stayed in the jury room during deliberations. 507 U.S. at 729-30. Here, they did not; indeed, the regular jurors and the undischarged alternates were never in physical proximity while the deliberative process was ongoing.

[14] On one occasion when the regular jurors were on a mid-morning break, an alternate juror retrieved a plate of delicacies from the jury room. Defense counsel brought this interlude to Judge Young's attention, and the judge immediately agreed to instruct the alternates to stay out of the jury room during breaks (except for retrieving snacks from the jury room when court security officers confirmed that a break in deliberations had occurred).

On another occasion defense counsel voiced suspicion that a note from the jury to the judge (requesting transcripts of several witnesses' testimony) had been written in the presence of the alternates. At counsels' urging, Judge Young, in the course of responding to the note in open court, asked each juror whether "the alternates and the deliberating jurors, or vice versa, [had] discussed the substance of the case" during the (continued...)

allowed the alternates to come within earshot of the deliberating jurors.

Equally as important, the court did not leave either set of venirepersons uninstructed. At the beginning of his charge, Judge Young told the alternates not to discuss the substance of the case either among themselves or with the regular jurors. He then directed the regular jurors not to discuss the case with the alternates. Near the end of the charge, the judge admonished all the talesmen that "if [the regular jurors are] in the presence of the alternates or the alternates are in the presence of the jurors, [there is to be] no talking about the case, no deliberating about the case." The regular jurors retired to the jury room for their deliberations, and the undischarged alternates retired to an anteroom in the judge's chambers (which remained their base of operations for the duration of the deliberations).

The deliberations lasted eleven days.[15/] Each morning, Judge Young asked the regular jurors and the alternate jurors, on penalty of perjury, whether they had spoken about the case with anyone since the previous day's adjournment. On each occasion, all the jurors (regular and alternate) responded in the negative. The judge reiterated his instructions to both the

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[14/](...continued)

pertinent time frame. All the jurors responded in the negative, and Judge Young reinstructed the regular jurors not to discuss the case with, or deliberate in the presence of, the alternate jurors. The defendants took no exception either to the form of the inquiry or to the instructions that the court gave.

[15/] On the third day a regular juror had to be excused. With counsels' consent, Judge Young replaced the lost juror with an alternate and instructed the jurors to begin deliberations anew. On appeal, neither side contests the propriety of this substitution.

regular and alternate jurors at the close of every court session. In addition, he routinely warned the venire that, when they assembled the next morning before deliberations resumed, "no one is to talk about the case."

On this record, we believe that the regular jurors were well insulated from the risks posed by the retention of the alternates. The judge repeatedly instructed the jurors — in far greater detail than in *Olano* — and those instructions were delicately phrased and admirably specific. Appropriate prophylactic instructions are a means of preventing the potential harm that hovers when a trial court fails to dismiss alternate jurors on schedule. *See Olano*, 507 U.S. at 740-41; *United States v. Sobamowo*, 892 F.2d 90, 97 (D.C. Cir. 1989) (Ginsburg, J.) (attaching great importance to trial court's prophylactic instructions in holding failure to discharge alternate jurors harmless); *cf. United States v. Ottersburg*, 73 F.3d 137, 139 (7th Cir. 1996) (setting aside verdict and emphasizing trial court's failure to provide such instructions). Courts must presume "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case," *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985), and that they follow those instructions.

Here, we have more than the usual presumption that the jury understood the instructions and followed them. The court interrogated the entire panel — regular jurors and undischarged alternates — on a daily basis, and received an unbroken string of assurances that the regular jurors had not spoken with the alternates concerning the substance of the case, and vice versa. Just as it is fitting for appellate courts to presume, in the absence of a contrary indication, that jurors follow a trial judge's instructions, so, too, it is fitting for appellate courts to presume, in the absence of a contrary

indication, that jurors answer a trial judge's questions honestly.

One last observation is telling. Over and above the plenitude of instructions, there is another salient difference between this case and *Ottersburg* (the only reported criminal case in which a federal appellate court invalidated a verdict due to the trial court's failure to discharge alternate jurors). Here, unlike in *Ottersburg*, 76 F.3d at 139, the judge at no time permitted the alternates to sit in on, or listen to, the jury's deliberations (even as mute observers). Hence, the alternates had no opportunity to participate in the deliberations, and nothing in the record plausibly suggests that they otherwise influenced the jury's actions. If the mere presence of silent alternates *in the jury room during ongoing deliberations* cannot in and of itself be deemed to chill discourse or establish prejudice, *see Olano*, 507 U.S. at 740-41, it is surpassingly difficult to imagine how absent (though undischarged) alternates, properly instructed, could have a toxic effect on the deliberative process.[16/]

We will not paint the lily. Given the lack of any contact between regular and alternate jurors during ongoing deliberations, the trial judge's careful and oft-repeated instructions, the venire's unanimous disclaimers that any discussions about the case took place between the two subgroups, the overall strength of the prosecution's evidence

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[16/] In *Cabral v. Sullivan,* 961 F.2d 998 (1st Cir. 1992), a case that antedated *Olano,* we considered a civil analog to Criminal Rule 24(c) and stated that "[w]hen a trial court allows an . . . alternate juror[] to deliberate with the regular jurors . . . an inherently prejudicial error is committed, and the substantial rights of the parties are violated." *Id.* at 1002. In the instant case, unlike in *Cabral,* there is neither proof nor reason to suspect that the undischarged alternates participated in the regular jurors' deliberations.

on virtually all the counts of conviction, and the discriminating nature of the verdicts that were returned (e.g., the jury acquitted the appellants on sundry counts and also acquitted the fourth defendant, Herd, outright), we conclude that the government has carried its burden of demonstrating that the outcome of the trial would have been precisely the same had the district court dismissed the alternate jurors when the jury first retired to deliberate. It follows that because the appellants suffered no prejudice in consequence of the court's bevue, they are not entitled to return to square one.

IV. DISCOVERY DISPUTES

The appellants stridently protest a series of government actions involving document discovery. We first deal with a claim that implicates the scope of the Jencks Act, 18 U.S.C. § 3500, and then treat the appellants' other asseverations.

A. Scope of the Jencks Act.

The Jencks Act provides criminal defendants, for purposes of cross-examination, with a limited right to obtain certain witness statements that are in the government's possession. That right is subject to a temporal condition: it does not vest until the witness takes the stand in the government's case and completes his direct testimony. *Id.* § 3500(a). It is also subject to categorical, content-based restrictions delineated in the statute: a statement is not open to production under the Jencks Act unless it (i) relates to the same subject matter as the witness's direct testimony, *id.* § 3500(b), and (ii) either comprises grand jury testimony, *id.* § 3500(e)(3), or falls within one of two general classes of statements, namely,

> (1) a written statement made by [the] witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a

> substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement . . . .

18 U.S.C. § 3500(e)(1)-(2).

In this case, the government agents who led the investigation instructed all but the most senior prosecutors to refrain from taking notes during pretrial interviews. The appellants decried this practice in the district court, but Judge Young found that even the deliberate use of investigatory techniques designed to minimize the production of written reports would not violate the Jencks Act. Before us, the appellants renew their challenge. We, too, think that it lacks force.

The Jencks Act does not impose an obligation on government agents to record witness interviews or to take notes during such interviews. After all, the Act applies only to recordings, written statements, and notes that meet certain criteria, not to items that never came into being (whether or not a prudent investigator — cynics might say an unsophisticated investigator — would have arranged things differently). *See United States v. Lieberman*, 608 F.2d 889, 897 (1st Cir. 1979) (rejecting a claim that the government has "a duty to create Jencks Act material by recording everything a potential witness says"), *cert. denied*, 444 U.S. 1019 (1980); *accord United States v. Bernard*, 625 F.2d 854, 859 (9th Cir. 1980); *United States v. Head*, 586 F.2d 508, 511-12 (5th Cir. 1978); *United States v. Fielbogen*, 494 F. Supp. 806, 814 (S.D.N.Y. 1980), *aff'd*, 657 F.2d 265 (2d Cir. 1981) (table). It has been suggested that if there were evidence that lawmen "engaged in manipulative or coercive conduct" during the course of an audience with a particular witness, the failure to record that event might give rise to a Jencks Act violation. *Lieberman*, 608 F.2d at 897 (dictum). But this dictum, even

if it might be of some moment in a proper case (a matter on which we take no view) is cold comfort to the appellants. There is no proof of such a scenario here,[17] and, without such proof, government interviews with witnesses are "presumed to have been conducted with regularity." *Id.*

In the absence of a contrary legislative command — and none currently exists — the choice among available investigatory techniques is, within wide limits, for the Executive Branch in contradistinction to the Judicial Branch. The practice challenged here is not beyond the pale. Accordingly, we hold that the government did not violate the Jencks Act by instructing agents to minimize note-taking.[18]

Still, we do not mean to imply that we endorse the practice. Eschewing tape recordings and ordering law enforcement agents not to take notes during pretrial interviews is risky business — and not guaranteed to redound either to the sovereign's credit or to its benefit. By adopting a "what we don't create can't come back to haunt us" approach, prosecutors demean their primary mission: to see that justice is done. In more parochial terms, the government also loses the advantage of records that it may subsequently

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[17] The appellants claim that instructing agents not to take notes constitutes a deliberate strategy to manipulate the quantity of discoverable material. But, this is simply not the sort of manipulation to which the panel referred in *Lieberman*.

[18] In a related vein, we likewise reject the appellants' assertion that the government violated the Jencks Act by parading law enforcement officers rather than percipient witnesses before the grand jury. "Hearsay evidence is a sufficient basis for an indictment," and the mere fact that the government chooses to rely on hearsay evidence in presenting its case before a grand jury raises "no hint of government misconduct." *United States v. Font-Ramirez*, 944 F.2d 42, 46 (1st Cir. 1991), *cert. denied*, 502 U.S. 1065 (1992).

need to safeguard against witnesses changing their stories or to refresh recollections dimmed by the passage of time. By and large, the legitimate interests of law enforcement will be better served by using recording equipment and/or taking accurate notes than by playing hide-and-seek.

B. Delayed Disclosures.

The appellants also complain that delays attributable to governmental foot-dragging unfairly hampered their ability to cross-examine witnesses. The centerpiece of this complaint is the appellants' insistence that, in addition to going very slowly in creating potentially discoverable materials, the prosecutors withheld extant materials, such as existing notes, under various pretexts, claiming that the notes comprised attorney work-product and that they did not contain substantially verbatim recitals of witnesses' statements.

The appellants' complaint is unproductive. Acting with commendable thoroughness, the district court reviewed all the prosecutors' notes and kindred materials in camera to determine which documents (or portions of documents) were producible under the Jencks Act. The government turned over what the court ordered it to produce at the time(s) when the court ordered production to be made.

In all events, we have held with a regularity bordering on the echolalic that "delayed disclosure claims cannot succeed unless the aggrieved defendant demonstrates prejudice arising from the delay." *Sepulveda*, 15 F.3d at 1179 (citing cases); *see also United States v. Saccoccia*, 58 F.3d 754, 781 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1322 (1996). In this context, demonstrating prejudice demands red meat and strong drink — but the appellants have served up much less hearty fare. They articulate how the delayed disclosures supposedly impeded their ability to cross-question witnesses largely by reference to two examples. Neither example is compelling.

First, the appellants suggest that they were unfairly surprised because, after Nardone's henchman, Michael Nelson, testified at trial that Fitzgerald alone had given Nardone a contract on the life of James Boyden III, they obtained the grand jury testimony of a subsequent witness (a law enforcement officer) which indicated that Nardone, in chatting with Nelson, implicated *both* Houlihan and Fitzgerald in ordering the hit.[19/] The appellants claim that the inconsistency between the officer's grand jury testimony, on one hand, and Nelson's trial testimony, on the other hand, could have been exploited to discredit Nelson on cross-examination. We are skeptical; given that Nelson's statements during his pretrial interview, *see supra* note 19, and at trial were consistent, this tidbit would have been of dubious value for impeachment purposes. Moreover, *while Nelson was still on the witness stand*, the appellants had possession of other documents that revealed the same inconsistency. For these reasons, we are fully satisfied that any delay in the disclosure of the law enforcement officer's grand jury testimony did not affect the outcome of the trial. Consequently, the incident fails to prove the appellants' point. *See, e.g., United States v. Devin*, 918 F.2d 280, 290-91 (1st Cir. 1990) (explaining that delayed disclosure of impeachment material does not warrant reversal if the material would not have altered the verdict).

The second vignette concerns a prosecutor's note to the effect that Nardone told Nelson that there were *two* reasons

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[19/] When this inconsistency surfaced, the government contended that the grand jury witness simply made a mistake, and pointed out that, according to the prosecutors' notes, Nelson stated in his pretrial interview that Fitzgerald alone issued the order. At this juncture the court directed the prosecutors to disclose the summary prepared by a government attorney for the use of the officer who appeared before the grand jury.

why Sargent had to be killed: first, because Houlihan felt that Sargent "was a risk" and "could hurt [Houlihan] by talking"; and second, "as a showing of respect to the Murrays" (a bookmaking group to whom Sargent was heavily indebted). Regarding the second reason, Nelson explained that Fitzgerald and Houlihan asked the Murrays to post $50,000 bail for Bobby Levallee, an organization stalwart, in exchange for having Sargent killed. Because the government did not reveal this note until after Nelson had completed his testimony, the appellants' thesis runs, they were unable to cross-examine him efficaciously.

This proffer, too, is wide of the mark. Under any circumstances, the note has only marginal evidentiary value in light of the extensive proof confirming Houlihan's desire to silence Sargent in order to keep him from telling the government what he knew — a desire that the note itself acknowledges. Even more important, the appellants had sufficient notice of the alternative "gambling debts" motive well before Nelson left the stand. Nelson himself testified on direct examination that Fitzgerald and Houlihan wanted Sargent killed for "two reasons": because they believed that the police had coopted him *and* because they were concerned about "all [Sargent's] gambling debts." And, moreover, the record indicates that the appellants had the rest of the prosecutors' notes (some of which discussed the alternative motivation) in hand *before* Nelson completed his testimony; indeed, Houlihan's counsel relied on those notes to elicit information on cross-examination about Sargent's gaming debts and his connection to the Murrays. Under these circumstances, no reversible error inhered. *See, e.g.*, *Saccoccia*, 58 F.3d at 781 (finding no prejudice from delay when defense counsel obtained information in time to prepare cross-examination); *United States v. Hodge-Balwing*, 952 F.2d 607, 609 (1st Cir. 1991) (finding no prejudice from late

delivery of documents when the prosecutor's opening statement alerted the defense to the same information).

If more were needed — and we doubt that it is — the sockdolager is the district court's volunteered ruling that the appellants could recall Nelson during their case for further cross-examination on the basis of the information disclosed in the note. The appellants chose to let this opportunity pass. The rule is clear that a defendant's failure to recall a witness, despite permission to do so, undermines a claim of prejudice based on a disclosure that materialized after the witness finished testifying (but before the trial ended). *See United States v. Arboleda*, 929 F.2d 858, 864 (1st Cir. 1991); *United States v. Dunn*, 841 F.2d 1026, 1030 (10th Cir. 1988).

C. Supervisory Power.

In a last-ditch effort to right a sinking ship, the appellants embrace a dictum contained in *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991) ("When confronted with extreme misconduct and prejudice as a result of delayed disclosure, this court will consider invoking its supervisory powers to secure enforcement of better prosecutorial practice and reprimand of those who fail to observe it.") (citation and internal quotation marks omitted). Based on this dictum, they ask that we unleash our supervisory power and vacate their convictions as an object lesson to the government. In the bargain, they suggest that we issue a blanket rule prohibiting prosecutors from instructing their colleagues in law enforcement not to take notes during witness interviews.[20/]

[20/] Respecting, as we do, the coordinate powers of the other two branches of government, we decline to issue any such blanket proscription. *See supra* Part IV(A) (discussing particulars of appellants' underlying objection).

Federal courts should refrain from dismissing charges or overturning convictions merely as a device to conform executive conduct to judicially favored norms. Rather, the courts' supervisory power should be used in this way only if plain prosecutorial misconduct is coupled with cognizable prejudice to a particular defendant. *See United States v. Santana*, 6 F.3d 1, 10-11 (1st Cir. 1993); *United States v. Pacheco-Ortiz*, 889 F.2d 301, 310 (1st Cir. 1989); *see also United States v. Hasting*, 461 U.S. 499, 507 (1983) (holding that when prosecutorial misconduct constitutes no more than harmless error, no relief is warranted under supervisory power).

Here, both prerequisites for judicial intervention are wanting. First and foremost, the tactics complained of — if improper at all — fall far short of a showing of egregious misconduct that might impel a federal court to consider the drastic step of vacating a conviction as a sanction against overzealous prosecutors. Second, the delayed disclosures did not harm the defendants' substantial rights. *See United States v. Walsh*, 75 F.3d 1, 8 (1st Cir. 1996) (demonstrating prejudice requires more than mere "assertions that the defendant would have conducted cross-examination differently").

That ends the matter. The supervisory power is strong medicine and, as we have said, "[p]otent elixirs should not be casually dispensed." *Santana*, 6 F.3d at 10. There is no reason to write such a prescription in the circumstances of this case.

V. MISCELLANEOUS

The appellants, represented by able counsel, marshal a plethora of other arguments. We address some of these arguments, explaining briefly why we accept or reject them. The points that we do not mention are insubstantial and may

be dismissed without elaboration.

A. Murder for Hire.

Fitzgerald and Houlihan, in chorus, challenge the sufficiency of the evidence supporting their murder-for-hire convictions arising out of the annihilations of Boyden III (count 15) and Sargent (count 16), and the attempts on Sweeney's life (count 17). With one exception, the sole ground on which these challenges rest is the allegation that the prosecution fell short of establishing the requisite nexus between the use of interstate facilities and the defendants' biocidal activities.[21/] The challenge fails.

The controlling legal standard is prosaic. "When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the government's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict." *United States v. Valle*, 72 F.3d 210, 216 (1st Cir. 1995). Though each element of the offense must be proven beyond a reasonable doubt, the government's burden "may be satisfied by either direct or circumstantial evidence, or any combination thereof." *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir. 1994). If a rational jury, indulging all credibility calls in favor of the verdict, could find the defendant guilty on this basis, then the inquiry terminates. *See United States v. David*, 940 F.2d 722, 730 (1st Cir. 1991), *cert. denied*, 502 U.S. 1046 (1992).

Moving from the general to the specific, the murder-for-hire statute makes it unlawful to use or cause another person

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[21/] The exception relates to count 15, as to which Houlihan offers a wider-ranging sufficiency challenge. We address that challenge separately. *See infra* Part V(B).

to use "any facility in interstate or foreign commerce, with intent that a murder be committed . . . as consideration for . . . anything of pecuniary value." 18 U.S.C. § 1958. In this case, the prosecution sought to convict by proving, *inter alia*, that the plotters used telephone calls as a means of accomplishing their ends. The appellants did not claim below, and do not now claim, that telephone lines fall outside the rubric of "facilities in interstate commerce." We therefore assume that point in the government's favor, *see United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992) ("It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals."); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) (noting "settled appellate rule" that issues not briefed and properly developed on appeal are waived), *cert. denied*, 494 U.S. 1082 (1990), and consider only the claim that they do advance: that the evidence fails to show the use of telephones in the course of committing the charged crimes.

In interpreting 18 U.S.C. § 1958, it is entirely appropriate to look to case law construing the Travel Act, 18 U.S.C. § 1952. *See United States v. Edelman*, 873 F.2d 791, 794 (5th Cir. 1989) (explaining that Travel Act jurisprudence is a proper referent because "the obvious purpose" of the murder-for-hire statute is "to supplement" the Travel Act); *see also* S. Rep. No. 225, 98th Cong., 1st Sess. 306, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3485 (noting that the murder-for-hire statute "follows the format" of the Travel Act). In *United States v. Arruda*, 715 F.2d 671 (1st Cir. 1983), a Travel Act case, we stated: "There is no requirement that the use of the interstate facilities be essential to the scheme: it is enough that the . . . use of interstate facilities makes easier or facilitates the unlawful activity." *Id.* at 681-82 (citations and internal quotation marks omitted). This is the commonly held view, *see, e.g.*, *United States v. Lozano*, 839 F.2d 1020, 1022

(4th Cir. 1988); *United States v. Smith*, 789 F.2d 196, 203 (3d Cir.), *cert. denied*, 479 U.S. 1017 (1986), and we confirm today that the non-essentiality principle announced in *Arruda* is embodied in the murder-for-hire statute.

The key, then, is whether the jury plausibly could have found that the appellants actually used a telephone to facilitate Sargent's and Boyden the elder's deaths and the attempts on Sweeney's life. We hasten to add, however, that there is no requirement that each accused use a facility in interstate commerce, or that each accused intend such a facility to be used, or even that each accused know that such a facility probably will be used. *See Edelman*, 874 F.2d at 795; *see also United States v. Heacock*, 31 F.3d 249, 255 n.10 (5th Cir. 1994) (applying identical principle under Travel Act); *United States v. Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987) (same); *United States v. McPartlin*, 595 F.2d 1321, 1361 (7th Cir.) (same), *cert. denied*, 444 U.S. 833 (1979). Hence, if the government proves that one of the participants used the telephone or some comparable interstate facility in furtherance of the scheme, then the required facilitative nexus is established as to all participants.

In this case, we think that the jury rationally could find a facilitative nexus between the use of telephones and the criminal activities underlying the counts of conviction. By March of 1992, Fitzgerald, a parole violator, had taken up involuntary residence in a state penitentiary. The record, together with reasonable inferences extractable therefrom, permitted the jury to find that he made daily telephone calls from prison to an indicted coconspirator, John Doherty, at Kerrigan's Flower Shop; and that Doherty, acting as Fitzgerald's internuncio, supplied Nardone with the weaponry needed to mount the attacks. Telephone records introduced into evidence also indicate that Fitzgerald called Nardone

several times at Lynch's apartment in and around the dates on which the murders were to occur. Since the jury reasonably could regard the various calls as an important link in the communicative chain that led to murder and attempted murder, the appellants' challenge founders.[22/]

B. The Murder of James Boyden III.

Houlihan asserts that his convictions on count 5 (conspiring to murder James Boyden III in aid of racketeering), count 6 (abetting that murder), and count 15 (hiring another to perform that murder) cannot stand. His major theme is that the government failed to link him to the murder in any meaningful way. We find merit in this proposition.

To convict Houlihan for conspiring to murder in aid of racketeering, *see* 18 U.S.C. § 1959(a), or for abetting the murder, *see id.*, the government had to prove that (1) the organization masterminded by Fitzgerald and Houlihan constituted a racketeering enterprise; (2) that, depending on the count, Houlihan conspired to commit, or aided and abetted the commission of, the murder; and (3) that Houlihan participated in the arrangement "for the purpose of maintaining or increasing [his] position in a [racketeering] enterprise." *Id.* By like token, under the murder-for-hire statute the government had to prove (1) that Houlihan joined

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[22/] Although not an element of the offense, it is pellucid that the jury easily could have believed Fitzgerald's actions vis-à-vis Sargent and Sweeney were undertaken with Houlihan's knowledge and consent. To cite just one example, Houlihan personally paid Nardone his $5,000 "headache elimination" fee at Kerrigan's Flower Shop on the day after Nardone ended Sargent's life. Further examples are unnecessary. It suffices to say that extensive evidence pointed to the conclusion that Fitzgerald and Houlihan jointly orchestrated both Sargent's slaying and Sweeney's travails.

in causing the killing of another, (2) paying a price or other consideration, (3) with the specific intent to commit the substantive crime (murder), and (4) that interstate facilities were used by one or more of the participants in the course of perpetrating the crime. *See* 18 U.S.C. § 1958.

A common thread runs through all three counts. In one form or another, the government had to prove beyond a reasonable doubt that in the spring of 1992 Houlihan "conspired to murder James Boyden III" (count 5), and/or "aided, abetted, counselled, commanded [or] induced" that murder (count 6), and/or used "facilities in interstate commerce . . . to hire other individuals and to arrange the intended murder of James Boyden III" (count 15). Under each of these counts, the government had to show at a bare minimum that Houlihan intended the murder of James Boyden III to take place and that he acted upon that intent. *See, e.g., United States v. Santiago*, 872 F.2d 1073, 1079 (1st Cir.) (explaining that proof of a charged conspiracy requires, *inter alia*, proof of intent to commit the substantive offense), *cert. denied*, 492 U.S. 910 & 493 U.S. 832 (1989); *United States v. Loder*, 23 F.3d 586, 591 (1st Cir. 1994) (stating that an aider and abettor must "consciously share[] the specific criminal intent of the principals"); 18 U.S.C. § 1958 (specifically requiring proof that the defendant acted with "intent that a murder be committed"). In other words, as Judge Young instructed the jury, the government had to show that Houlihan "intentionally arranged for the murder of James Boyden III by Joseph Nardone," or "aided and abetted that crime," and that he had the "specific intent" of causing the murder.

We have combed the record in light of this highly specific subset of charges to determine whether the government satisfied its burden of proving beyond a reasonable doubt that

Houlihan perpetrated these three interrelated crimes. We have come up empty. In our judgment there is insufficient evidence that Houlihan, whatever other atrocities he may have committed, intended to bring about the execution of James Boyden III, or that he participated in any culpable way in the commission of that crime.

The evidence depicts Fitzgerald as the leader of the organization and Houlihan as his second-in-command. The government's theory is that Nardone killed Boyden III, and that Fitzgerald and Houlihan jointly directed him to do so. But the government's star witness, Nelson, testified that, according to Nardone, Fitzgerald alone ordered the murder.[23/]

This seems reasonable in view of the fact that the murder grew out of events surrounding the assassination of the victim's son (Boyden IV). The younger Boyden, against Fitzgerald's explicit warning, had continued to sell cocaine in the "sales territory" assigned to Jennierose Lynch (Fitzgerald's paramour). After several violent encounters, Boyden IV turned up dead. The government charged Fitzgerald, Lynch, and Herd — but not Houlihan — with that murder. As recounted earlier, the judge granted Fitzgerald's motion for a mistrial on those charges (and he presumably remains subject to retrial); the judge ordered the charges against Lynch dropped as part of an overall plea bargain; and the jury acquitted Herd.

The record strongly suggests that the son's murder set the stage for the father's murder, and that the killings were

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[23/] Indeed, when it was pointed out that a grand jury witness had testified otherwise, the government protested that the witness had made a mistake. *See supra* note 19. The grand jury testimony was not admitted at the trial.

related. The government makes no effort to implicate Houlihan in the former crime, and there is only a tenuous set of inferences linking him to the latter crime.

Virtually the only intimation that Houlihan may have played a role in the killing of Boyden III comes from Sargent's tape-recorded statement during which the following colloquy transpired (references in the colloquy to "Boyden, Sr." refer to James Boyden III):

> **SARGENT:** I was having a couple of drinks, and [Houlihan] mentioned . . . that — that there's two . . . that's going to go.
>
> * * *
>
> . . . John Houlihan mentioned before that he could have somebody kill anybody he wants.
>
> * * *
>
> **DET. HARRIS:** There was the homicide of James Boyden, Sr.
>
> **SARGENT:** Right.
>
> **DET. HARRIS:** Would you tell us about that homicide?
>
> **SARGENT:** All I know is when I had talked to John in the bar, he had mentioned there was going to be two . . . people dead, and that night — that same night that I talked to him, that's when Boyden Sr. got killed . . .
>
> **DET. HARRIS:** How many hours before Boyden Sr. was killed did that conversation with [Houlihan] take place?
>
> **SARGENT:** I'd say about three hours.

Passing obvious questions about the reliability of this uncorroborated hearsay statement, *see supra* note 7 & accompanying text, this seems too porous a foundation on which to rest homicide charges.

Laying out the inferential chain on which the government's theory depends illustrates its weakness. From the dialogue that we have quoted, the government suggests that a jury could plausibly infer that Houlihan was referring to the upcoming murder of James Boyden III in his "two . . . that's going to go" comment; and that, from this inference, the jury could plausibly infer that Houlihan intended to bring about that murder and participated in it in some meaningful way. This is simply too great a stretch. Houlihan did not mention James Boyden III in his conversation with Sargent, and it is not even clear that Sargent understood Houlihan to be referring to any particular individuals. Rather, the import of Sargent's comment seems to be that succeeding events filled in the blanks. And even if we accept the first suggested inference, the record hardly will support the further inference that Houlihan had a specific intent to murder James Boyden III, or that he abetted the ensuing crime. At most, the conversation suggests an awareness of a planned slaying, not necessarily participation in it.

The government tries to buttress these strained inferences by pointing to Sargent's parroting of Houlihan's statement that he "could have somebody kill anybody" and labelling this as evidence that Houlihan directed the commission of this particular murder. But that argument proves too much. On the government's reasoning, Houlihan could have been charged and convicted of *any* murder. The government also points out that, on the day after the murder, Nardone collected his fee at Kerrigan's Flower Shop. Because this bore some resemblance to the method of payment that

Houlihan employed after Nardone murdered Sargent, *see supra* note 22, the government asks us to infer that Houlihan also must have arranged this payment. We think for two reasons that the suggested inference is dubious. First, the difference in payment methodology is significant: on the latter occasion (Sargent's murder), the government proved that Houlihan personally paid the fee to Nardone; on the former occasion (Boyden the elder's murder), it did not. Second, the record shows that Fitzgerald not only ordered the murder of James Boyden III but also, though imprisoned, remained in daily contact with Doherty, and that Doherty (who was based at Kerrigan's) or any of several other underlings could have arranged the payment.

Even so, given the working relationship between Houlihan and Fitzgerald and their use of Nardone as a triggerman in connection with Sargent's murder and the attempts on Sweeney's life, the question of evidentiary sufficiency is close. In the end, however, we do not think that the evidence measures up to the requirement — which we apply de novo — that a reasonable jury be able to find each element of the crime to have been proven beyond a reasonable doubt. Given Nelson's uncontradicted testimony that only one individual — Fitzgerald — sanctioned the execution of James Boyden III, and also given the nexus between the Boydens' murders, we believe that the chain of inferences forged by the prosecution is too loose (albeit by the slimmest of margins) to hold Houlihan criminally responsible for the charged crimes.

C. Severance.

The reader will recall that the indictment charged Herd, Lynch, and Fitzgerald — but not Houlihan and Nardone — with offenses related to the murder of James Boyden IV. Houlihan and Nardone contend that the court had an obligation to sever their trials from the trial of the counts

relating to the Boyden IV murder.[24/] We disagree.

When several defendants are named in a unified indictment, there is a strong presumption that they should be tried together. *See Zafiro v. United States*, 506 U.S. 534, 538-39 (1993); *O'Bryant*, 998 F.2d at 25. To obtain a severance under such circumstances, a defendant must demonstrate extreme prejudice, such as by showing a "serious risk that a joint trial would compromise a specific trial right," or would "prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539.

Houlihan and Nardone cannot scale these heights. Their central thesis is that the government's evidence concerning the Boyden IV murder tended to show that the victim was slaughtered in an organization-related turf battle, and therefore threatened to infect the jury's consideration of other counts. But they dress this thesis in the gossamer vestments of speculation and surmise. That is not enough. "There is always some prejudice in any trial where more than one offense or offender are tried together — but such 'garden variety' prejudice, in and of itself, will not suffice" as a basis for obligatory severance. *Boylan*, 898 F.2d at 246.

To be sure, there is a gray area in which reasonable people might disagree about the advisability of a severance. In the vast majority of those cases, however, the severance battle is conclusively won or lost in the district court. *See O'Bryant*, 998 F.2d at 25 (explaining that the court of appeals ordinarily should defer to the district court's evaluation of the necessity for separate trials); *United States v. Natanel*, 938

[24/] Ironically, none of the counts related to this murder bore fruit: the jury found Herd not guilty; the court relieved Lynch of responsibility when she pleaded guilty to other counts; and the court granted Fitzgerald a mistrial.

F.2d 302, 308 (1st Cir. 1991) (holding that a denial of severance will only be reversed for a "manifest abuse of discretion"), *cert. denied*, 502 U.S. 1079 (1992). This case falls within the sweep of that generality, not within the long-odds exception to it. Not only is the inference of undue prejudice that the appellants seek to draw somewhat attenuated, but also any possible prejudice was dissipated by the trial court's firm, carefully worded, and oft-repeated instructions to the jurors, forbidding them from considering the evidence anent the murder of Boyden the younger in deciding the charges against either Houlihan or Nardone.[25/] On this record, we are confident that the trial court did not abuse its considerable discretion in denying the requested severance. *See, e.g., Boylan*, 998 F.2d at 25; *United States v. Gomez-Pabon*, 911 F.2d 847, 859-60 (1st Cir. 1990), *cert. denied*, 498 U.S. 1074 (1991).

D. The Ford/McDonald Conundrum.

At trial the government called Steven Ford and Edwin McDonald as witnesses regarding the murder of James Boyden IV. Houlihan and Nardone successfully solicited limiting instructions. Prior to each witness's testimony Judge Young admonished the jury that the testimony was admissible only against Fitzgerald, Herd, and Lynch, and not against Houlihan or Nardone. Notwithstanding these limiting instructions, Houlihan and Nardone asked to cross-examine Ford and McDonald. The court blocked that maneuver. Houlihan and Nardone press the point in this venue, alleging

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[25/] The court enhanced the efficacy of the limiting instructions by insisting that all the government's evidence relating to this murder be presented compactly at the same point in the trial. This is a salutary practice, and we commend it generally to trial courts confronted with analogous situations.

that the court's ruling violated their confrontation rights and otherwise constituted an improper exercise of discretion.

To demonstrate a violation of the Confrontation Clause, a defendant must show that he was "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Van Arsdall*, 475 U.S. at 680. Here, there was no abridgement of the defendants' constitutional rights. The Confrontation Clause demands that a defendant have the opportunity to confront and cross-examine the witnesses *against him*; at least in the absence of special circumstances — and none appear here — the Clause does not create a right to confront or cross-examine persons who appear as witnesses exclusively against others (even if the others are codefendants in a joint trial). Because neither Ford nor McDonald was a witness "against" either Houlihan or Nardone, the constitutional claim is stillborn.

Absent a constitutional violation, "appellate courts will grant relief from the shackling of cross-examination only for manifest abuse of discretion." *Boylan*, 898 F.2d at 254. We discern no trace of abuse in this instance. Despite the lack of cross-examination,[26] the limiting instructions fully protected Houlihan's and Nardone's legitimate interests. Furthermore, allowing counsel for Houlihan and Nardone to cross-examine Ford and McDonald could well have had a boomerang effect, leading the jury to believe that, contrary to the judge's instructions, the testimony had some relevance to the charges against their clients. Hence, the restriction on cross-examination was well-tailored to the occasion.

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[26] Of course, these witnesses did not emerge unscathed. Ford and McDonald were vigorously cross-examined by counsel for the implicated defendants, Fitzgerald included.

E. Rulings Related to the Partial Mistrial.

After granting Fitzgerald a partial mistrial on the counts pertaining to the murder of James Boyden IV, the district court refused to grant his motion to strike the testimony of three witnesses, each of whom testified to some extent about that murder,[27] or in the alternative, to declare a mistrial on the remaining counts against him. Before us, Fitzgerald claims that the testimony had no relevance to the surviving counts, and included details about the slaying of the younger Boyden that might well have horrified the jurors and prejudiced them against him.

We review the district court's ruling to admit or exclude particular evidence for abuse of discretion. *See United States v. Rivera-Gomez*, 67 F.3d 993, 997 (1st Cir. 1995); *United States v. Holmquist*, 36 F.3d 154, 163 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1797 (1995). The same standard pertains to motions to strike evidence previously admitted. *See Sepulveda*, 15 F.3d at 1184. Here, the district court styled the disputed testimony as being "probative . . . of other counts in the case," and denied the motion to strike on that basis. Having scrutinized the testimony in light of the surviving charges against Fitzgerald, we are persuaded that, as Fitzgerald maintains, it was prejudicial to some degree. But that is not the end of the road. "[A]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989) (emphasis in original). Thus, our inquiry must proceed.

Fitzgerald cast the motion to strike in "all or nothing"

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[27] The witnesses in question are Veronica Boyden (the mother of James Boyden IV), Marie Boyden-Connors (his sister), and Frances Hannigan (a former owner of Kerrigan's Flower Shop).

terms. In ruling on it, the district court had to compose a balance between the probative value of the evidence as a whole and the risk of unfair prejudice attendant to keeping it before the jury. *See* Fed. R. Evid. 403. And though the evidence was prejudicial in a sense, it was also plainly probative of Fitzgerald's role as the kingpin in the organization and bore directly on the remaining charges against him.[28/]

While the question is admittedly close, we are unprepared to say that the evidence's unfairly prejudicial impact substantially outweighed its probative worth. "Only rarely — and in extraordinarily compelling circumstances — will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighting of probative value and unfair effect." *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988). This is not such an occasion. It follows that the lower court did not misuse its discretion in denying both Fitzgerald's motion to strike and his alternative motion to declare an across-the-board mistrial.

F. The Armed Robbery Reference.

Nardone had also been charged with committing several

[28/] A few examples may assist in giving texture to this conclusion. Veronica Boyden testified that she heard Lynch, an indicted coconspirator, threaten to call Fitzgerald if James Boyden IV continued to poach on her sales territory. Similarly, Boyden-Connors testified that Fitzgerald himself warned her to keep her brother away from Lynch's territory. Hannigan's testimony, overall, related more to the structure and operating practices of the Fitzgerald-Houlihan organization and less to the slaying of James Boyden IV. By way of illustration, Hannigan testified at length about Fitzgerald's presence at Kerrigan's Flower Shop, his meetings there with other members of the conspiracy, and his daily telephone calls to Doherty from his prison cell during the period of his immurement.

armed robberies. The district court severed the armed robbery counts before trial. When Nelson (one of Nardone's alleged coconspirators) testified, Houlihan's counsel cross-examined him. In the course of the cross-examination, the lawyer proffered a copy of Nelson's cooperation agreement with the government. No objection appearing, the court admitted the document into evidence. Appended to the cooperation agreement (now a full exhibit) was a copy of the information that the government had filed against Nelson (which contained, *inter alia*, a count that described an alleged Nelson/Nardone armed robbery). Four days later, Nardone's counsel asked the district court to delete all references to him from the exhibit before it went to the jury. The court refused. Nardone assigns error. We uphold the ruling.

There is danger in delay, and the contemporaneous objection rule is, for the most part, strictly enforced in this circuit. *See, e.g., United States v. Taylor*, 54 F.3d 967, 972 (1st Cir. 1995); *United States v. Griffin*, 818 F.2d 97, 99-100 (1st Cir.), *cert. denied*, 484 U.S. 844 (1987). While it is true in this case that Nardone's attorney ultimately objected, a belated objection does not cure the original default.

To be sure, we might be impelled to intervene if we thought that, despite the lack of a contemporaneous objection, the district court committed plain error by refusing to redact the references to Nardone which appeared in the information. *See Olano*, 507 U.S. at 732-37 (discussing dimensions of plain error review); *see also* Fed. R. Crim. P. 52(b). But here, no plain error looms. During cross-examination of Nelson — two days *after* Houlihan's counsel introduced the cooperation agreement into evidence without objection and two days *before* Nardone's counsel broached the idea of redaction — the latter questioned Nelson extensively about the armed robbery and drug conspiracy described in the

information. Although these questions were artfully phrased to avoid any explicit reference to Nardone's participation in those crimes, we believe that this harping on the contents of the information bolsters the district court's decision not to excuse the lack of a contemporaneous objection. We conclude, therefore, that the court acted within its discretion in declining to relax the usual rule and in rejecting Nardone's tardy request for redaction.[29/]

G. Jury Instructions.

The appellants posit that the district court's charge did not impart the degree of participation required to convict a defendant of conspiracy charges under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1969. The RICO statute criminalizes "conduct[ing] or participat[ing], directly or indirectly, in the conduct of [an] enterprise's affairs" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). To convey this element of the RICO offenses, Judge Young instructed the jury that the prosecution must prove beyond a reasonable doubt,

> that by engaging in a pattern of racketeering activity the specific individual accused . . . conducted or participated in the conduct of the enterprise's affairs. The term conduct and participate in the conduct of an enterprise includes the performance of acts, functions

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[29/] As an aside, we note that there is no inkling of any prejudice stemming from this ruling. For one thing, the jury acquitted Nardone on several counts, so it is impossible to argue convincingly that the unredacted information irretrievably poisoned the jurors against him. For another thing, given the powerful evidentiary strands that tied Nardone tightly to two brutal murders and several other murder attempts, we doubt that the references about which he now complains could conceivably have altered the jury's verdicts.

> or duties which are related to the operation of the enterprise. A person may be found to participate in the conduct of the enterprise even though he has no part in the management or control of the enterprise.

The appellants fault this instruction because it told the jury that a defendant could be found guilty even if he did not participate "in the management or control of the enterprise." In their view, the Court's opinion in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), signifies the opposite. But this asseveration misconstrues *Reves*. There, the Court interpreted the words "conduct or participate" as they appear in section 1962(c), and determined that those words require a defendant's participation in either "the operation or management of the enterprise itself." *Id.* at 185. But because the defendant in *Reves* was an outside accounting firm that had only a contractual relationship with the allegedly corrupt enterprise — it audited the books and issued financial reports, but neither controlled the enterprise nor participated in either its operation or management — RICO liability did not attach. *See id.* at 186.

The case at hand is of a distinctively different stripe. Unlike the accountants in *Reves*, who were classic "outsiders," the appellants here are quintessential "insiders," that is, persons whom the evidence places in the maw of the criminal activity.[30/] We have previously held that insiders who are

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[30/] Nardone's claim that he was an independent contractor is imaginative but unconvincing. The evidence supports the view that Nardone was an insider. He maintained regular contact with Fitzgerald and Houlihan throughout the duration of the conspiracy; he obtained his armaments directly from them; and he took orders from them. Indeed, Nardone's description of himself as the organization's "hit man" and "headache man" belies his more recently manufactured "independent contractor" label.

integral to carrying out the enterprise's racketeering activities — and the appellants clearly fit that description — come within the definitional sweep of section 1962(c). *See United States v. Hurley*, 63 F.3d 1, 9 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1322 (1996); *United States v. Oreto*, 37 F.3d 739, 750-51 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995). The instructions given in this case are in all material respects identical to those that we approved in *Hurley* and *Oreto*. Consequently, we reject this assignment of error without further elaboration.[31/]

H. Forfeiture.

Houlihan contends that the government failed to produce sufficient evidence to support the forfeiture of a house located at 80 Ferncroft Road, Tewksbury, Massachusetts. The government lodged the forfeiture count under 18 U.S.C. §

[31/] The appellants also claim that the district court erred by refusing to repeat its concededly correct definition of what constitutes a racketeering "enterprise" in its instructions to the jury on those counts that charged murder and attempted murder in aid of racketeering. Judge Young chose instead to incorporate by reference his correct definition of a RICO enterprise (given to the jury earlier in the charge); and, in the same vein, he specifically informed the jury that, as to all racketeering-related counts, they must find the existence of an enterprise meeting the statutory criteria as an element of each offense. In light of the perfectly sensible course taken by the judge, the appellants' claim is unfounded. A trial court has broad discretion to formulate jury instructions as it sees fit, as long as it touches all the bases. *See United States v. DeStefano*, 59 F.3d 1, 4 (1st Cir. 1995). Here, taking the charge as an integrated whole, *see, e.g., United States v. Cintolo*, 818 F.2d 980, 1003 (1st Cir. 1987), *cert. denied*, 484 U.S. 913 (1988), we find no error.

1963(a)[32] and the jury found in its favor. The property had been deeded by a third-party seller to Francis Jackson (Houlihan's uncle), and Houlihan's contention is that, because title stood in Jackson's name, the property could not be forfeited in consequence of his (Houlihan's) peccadilloes.

"[C]riminal forfeiture is a punishment, not a separate criminal offense." *Saccoccia*, 58 F.3d at 783. In such a proceeding, the government can satisfy its burden of proof by either direct or circumstantial evidence. *See id.* at 782. In this instance we conclude without serious question that a rational factfinder could determine — as this jury did — that Houlihan was the de facto owner of the house, and that it had been purchased with proceeds derived from racketeering activity.[33]

Real estate agents testified that they took Houlihan and his

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[32] Insofar as it is germane to Houlihan's situation, the statute provides in substance that a RICO offender shall forfeit to the government any property interest or thing of value acquired with the proceeds of racketeering activity. *See* [32] 18 U.S.C. § 1963(a).

[33] The district court instructed the jury that the government had the burden of proving entitlement to forfeiture beyond a reasonable doubt. The proof here is capable of satisfying that standard. We note, however — although we leave the question open — that the government may have conceded too much. *Compare United States v. Tanner*, 61 F.3d 231, 234 (4th Cir. 1995) (holding that criminal forfeiture under 21 U.S.C. § 853 requires a preponderance of the evidence, not proof beyond a reasonable doubt), *cert. denied*, 116 S. Ct. 925 (1996) and *United States v. Elgersma*, 971 F.2d 690, 695 (11th Cir. 1992) (en banc) (holding that the preponderance-of-the-evidence standard applies generally in criminal forfeiture cases involving drug proceeds) *with United States v. Pelullo*, 14 F.3d 881, 906 (3d Cir. 1994) (holding that government, in a criminal forfeiture proceeding under 18 U.S.C. § 1963(a), must prove beyond a reasonable doubt that the targeted property was derived from the defendant's racketeering activity).

wife, along with Jackson, on tours of the dwelling several times during 1993; that Houlihan told them that he was "interested" in buying it; that Houlihan attended the pre-sale inspection and the two closings that proved to be necessary; and that the property was purchased entirely for cash (approximately $195,000). And, moreover, both Houlihan and his wife were in residence at the premises when the authorities arrested Houlihan in October of 1993.

These pieces of evidence combine to form a picture that reveals Houlihan as the actual owner of the home in Tewksbury, with Jackson serving merely as a straw. Then, too, the evidence is reinforced by the utter absence of any proof indicating how Jackson might have acquired so large an amount of cash. Given the totality of the circumstances, the jury was entitled to find that the house was forfeitable as a fruit of Houlihan's racketeering. *See id.* ("Jurors, after all, are not expected to resist common-sense inferences based on the realities of human experience.").

I. Sentencing.

The sentences imposed by the district court are unremarkable in most respects. The sole exception relates to count 20. That count charged Fitzgerald and Houlihan, among others, with conspiracy to distribute a controlled substance (cocaine) in violation of 21 U.S.C. § 846. As to Fitzgerald and Houlihan, Judge Young imposed contingent sentences of life imprisonment, to take effect "only if the sentence on count 19 [which charged a continuing criminal enterprise in violation of 18 U.S.C. § 848] is reversed [or] otherwise dismissed." Because we affirm the conviction and sentence on count 19, the contingency that Judge Young envisioned has not materialized. Hence, we now vacate Fitzgerald's and Houlihan's convictions and sentences on count 20. We explain briefly.

If an indictment charges a defendant with participating in both a conspiracy and a continuing criminal enterprise (CCE), and if the former is used as a predicate act to prove the latter, then the conspiracy is in actuality a lesser-included offense of the CCE charge, and the defendant may not lawfully be sentenced for both crimes. *See United States v. Rivera-Martinez*, 931 F.2d 148, 152-53 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991); *Stratton v. United States*, 862 F.2d 7, 9 (1st Cir. 1988) (per curiam). To do otherwise would result in cumulative punishment violative of the Double Jeopardy Clause. *See Jeffers v. United States*, 432 U.S. 137, 154-58 (1977) (plurality op.); *Rivera-Martinez*, 931 F.2d at 152-53.

We need not wax longiloquent, for the government, to its credit, concedes the point. Thus, our affirmance of Fitzgerald's and Houlihan's convictions and sentences on count 19 necessitates the vacation of their convictions and sentences on count 20. *See Rivera-Martinez*, 931 F.2d at 153 (holding that the Double Jeopardy Clause requires vacation of conviction and sentence on conspiracy count when a defendant is convicted and sentenced on both conspiracy and CCE counts).

VI. CONCLUSION

We need go no further. For the reasons we have discussed at length — perhaps at too much length — we affirm the convictions and sentences of all three appellants in all respects, save only for (a) Houlihan's convictions on counts 5, 6 and 15 (which are reversed), and (b) Fitzgerald's and Houlihan's convictions on count 20 (which are vacated).

So Ordered.

APPENDIX B

United States of America

v.

John Houlihan, Michael Fitzgerald,

William Herd, and Joseph Nardone,

Defendants.

Crim. No. 93-10291-WGY.

United States District Court,

D. Massachusetts.

May 4, 1995.

MEMORANDUM

YOUNG, District Judge.

Once again,[1] this complex criminal case has presented an issue of first impression in the First Circuit, namely whether a defendant who causes the absence from trial of a potential witness against him has waived the right to object on Confrontation Clause and hearsay grounds to the admission of the witness' prior out-of-court statements. More specifically, this Court here explains what standard of proof

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[1] In an earlier opinion on an issue not yet decided in this circuit, this Court ruled that statements made by a victim on the eve of his murder that he was going to meet one of the defendants were statements of then present intention, FED.R.EVID. 803(3), and, as such, were admissible not only to prove that the victim acted in conformity with his intention, but were also admissible on the issue of whether he actually met with one of the defendants. *See United States v. Houlihan*, 871 F. Supp. 1495 (D.Mass. 1994).

it applied in resolving preliminary questions concerning the admissibility of such hearsay evidence under a waiver theory; what state of mind, if any, the government was required to prove as to each defendant to support such a waiver theory; and whether hearsay statements can be admitted not only for the purpose of proving the factual matters asserted, but also as circumstantial evidence--*i.e.*, that the decedent was "ratting" to the police--in support of the charge of murdering the out-of-court declarant himself. Because this Court determined that the answers to these questions favored admissibility in this case, the Court here explains what evidence it admitted out of a melange of factual assertions, opinions, and street rumors. Finally--and perhaps most intriguing of all--having determined to admit redacted portions of these hearsay statements, the Court explains to what use it allowed the defendants to put the portions of the statements the Court ordered redacted.

I. BACKGROUND

This case involves the prosecution of twelve defendants alleged to be members of a ruthless cocaine trafficking enterprise. The defendants, or certain of them, were charged in a forty-eight count indictment with distribution of cocaine, conspiracy to distribute cocaine, engaging in a racketeering enterprise, racketeering conspiracy, three murders in furtherance of a racketeering enterprise, conspiracy to commit murder in furtherance of a racketeering enterprise, four attempted murders in furtherance of a racketeering enterprise, using firearms in relation to a federal crime of violence, engaging in a continuing criminal enterprise, and criminal

forfeiture.[2/] Three of the defendants--John Houlihan ("Houlihan"), Michael Fitzgerald ("Fitzgerald"), and Joseph Nardone ("Nardone")--were charged, inter alia, with murder in aid of racketeering for the homicide of George Sargent ("Sargent"), an alleged foot-soldier in the so-called criminal enterprise who, at the time of his murder, was cooperating with law enforcement authorities.[3/]

The government alleged that, prior to his death, Sargent told law enforcement officers that he was a street distributer for a Charlestown narcotics ring allegedly run by Houlihan and Fitzgerald. In his conversations with police, Sargent described the structure of the Houlihan-Fitzgerald cocaine operation, his role in the organization, and how he became

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[2/] Of the twelve original defendants, one--Joseph Houlihan--pleaded guilty prior to trial. Five defendants were severed. Two others--Allan Skinner and Jennierose Lynch--pleaded guilty after fifty days of trial. The failure of the Court further to sever and break apart this complex indictment into more digestible trials, *see e.g., United States v. Casamento*, 887 F.2d 1141, 1152 (2d Cir. 1989) (establishing a presumption that where the prosecution's case against multiple defendants will take more than four months severance is desirable); *United States v. Andrews*, 754 F. Supp. 1161, 1172 (N.D.Ill. 1990), warrants a separate memorandum.

[3/] According to the government, on March 6, 1992, the Massachusetts State Police executed a search warrant at 184 Bunker Hill Street, Apartment 2, in Charlestown--George Sargent's apartment. During the course of the search, the police seized large amounts of cocaine. Sargent was arrested and charged with trafficking in cocaine. Under questioning from law enforcement officials, Sargent voluntarily made the statements to the police which are at issue here.

involved.[4/] Moreover, according to the government, Sargent made statements that inculpated Fitzgerald and Houlihan in the murder of James Boyden III ("Boyden Sr."), and which inculpated Fitzgerald in the murder of James Boyden IV ("Boyden Jr."), and the attempted murder of William "Bud" Sweeney ("Sweeney"). Sargent further made statements that indicated he feared Houlihan might want him killed, and told the police that in an attempt to protect himself he had stressed to Houlihan that he was "on his side."

On June 28, 1992, George Sargent was killed by multiple gunshot wounds. The government alleged that Houlihan and Fitzgerald ordered Nardone to commit the murder because, among other things, they feared that Sargent was talking to the police about Houlihan and Fitzgerald's criminal conduct.

Prior to the commencement of the proceedings, the government moved in limine to introduce at trial Sargent's statements to the police[5/] despite the fact that Sargent was obviously unable to take the stand and therefore could not be subject to cross-examination by the defense. In support of the motion, the government argued that by murdering Sargent for the purpose of preventing him from cooperating with law enforcement authorities, Fitzgerald, Houlihan, and Nardone waived their rights to object to the admission of Sargent's

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[4/] Sargent explained to the police that he owed a sizeable gambling debt to North End "bookies" which Fitzgerald agreed to assume. In return, Sargent agreed to sell cocaine for Houlihan and Fitzgerald until his debt to Fitzgerald could be repaid.

[5/] Specifically, the government proposed to introduce the testimony of Police Trooper Mark Lemieux ("Lemieux") relaying statements made by Sargent to Lemieux on March 6, 1992, and a redacted version of a tape recording of an interview of Sargent conducted by Boston Police detectives on May 30, 1992.

out-of- court declarations. The government explained that, if admitted, Sargent's prior statements would be used to prove Fitzgerald's involvement in the murders of Boyden Jr., Boyden Sr., and Sargent himself, as well as his involvement in the conspiracy to distribute cocaine and in a continuing criminal enterprise; to prove Houlihan's involvement in the murders of Sargent and Boyden Sr., and his involvement in the drug conspiracy and in the continuing criminal enterprise; and as proof that Nardone killed Sargent and Boyden Sr. in aid of racketeering upon orders from Houlihan and Fitzgerald.

The Court deferred a determination of the issue until the government had presented the great bulk of its case so that the Court could make its decision upon a complete trial record and after extensive oral argument.[6/] On January 23, 1995, this Court heard argument on the matter. Pursuant to FED.R.EVID. 104(a), this Court was not bound by the rules of evidence in making its determination.[7/] Accordingly, the Court considered all relevant portions of the trial record as

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[6/] Houlihan, Fitzgerald, and Nardone argued that this procedure was nonetheless inadequate and that a full evidentiary hearing--with an opportunity to cross-examine witnesses outside the hearing of the jury--should have been conducted by the Court before the determination was made. Respectfully, the Court disagreed, deploring the burgeoning incidence of trials before trials and trials within trials. By holding off until almost the end of trial to rule on this issue, the defendants had the benefit of cross-examining the prosecution's witnesses in the trial proper. The actual trial proceeding combined with extensive oral argument on this issue was equally effective in safeguarding the defendants' rights as the voir dire proceeding requested by them, and was more than sufficient in the premises.

[7/] FED.R.EVID. 104(a) states: Preliminary questions concerning ... the admissibility of evidence shall be determined by the court.... In making its determination it is not bound by the rules of evidence except those with respect to privileges.

well as the Sargent hearsay statements themselves. *See Bourjaily v.* United States, 483 U.S. 171, 178-80 (1987). At the January 23rd hearing, the Court determined that substantially redacted portions of Sargent's statements to law enforcement authorities would be admissible at trial against Houlihan, Fitzgerald, and Nardone. On February 1, 1994, having reviewed the prosecutors' witness interview/trial preparation notes,[8/] the Court revised its earlier order, further redacting the Sargent statements and declining to admit any of them against Fitzgerald. This memorandum now sets out the legal reasoning for these decisions and goes on to consider various related issues.

[8/] It is necessary to explain here why the Court was looking at the government's notes. Apparently seeking to minimize material discoverable under the Jencks Act, 18 U.S.C.A. § 3500 (West 1985), the prosecutors alone made notes of the interviews with the key witnesses in this case. While law enforcement agents were present and have testified, they were apparently instructed not to make any written records as to these witnesses. The problems occasioned by this tactic will require a separate written opinion. It suffices here to say that this trial has involved a great deal of skirmishing over what constitutes a "substantially verbatim statement," *see United States v. Neal,* 36 F.3d 1190, 1198 (1st Cir. 1994), and impeachment evidence, *see United States v. Osorio,* 929 F.2d 753, 758 (1st Cir. 1991). The Court initially relied upon the government to turn over redacted portions of its notes to comply with the legal mandate of the cases just cited. When the government proved itself unable or unwilling to comply to the Court's satisfaction, the Court took over the job, reviewing the notes in their entirety and disclosing such portions as were discoverable. Thus, the government's notes were initially turned over to the Court *in camera* as a result of their failure to comply with this Court's earlier discovery instructions. *See* Trial Transcript, Vol. 41, at 162-76. In making its findings and rulings, the Court has not considered any portion of the prosecutors' notes not turned over to the defense and has not considered any of William "Bud" Sweeney's statements, as he had not yet testified at the time of decision.

II. DISCUSSION

A. The Waiver Theory

1. Sixth Amendment[2/]

A waiver of a constitutional right is ordinarily valid only where there is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). The United States Supreme Court has long recognized, however, that the Sixth Amendment right of a criminal defendant to confront the witnesses against him can be waived not only by consent, but also by the defendant's misconduct. *See Snyder v. Massachusetts,* 291 U.S. 97, 106 (1934) (constitutional rights may be waived by misconduct); *see also Illinois v. Allen,* 397 U.S. 337, 342-43 (1970) (disruptive courtroom conduct waived confrontation right); *Reynolds v. United States,* 98 U.S. 145, 158 (1878) (defendant's refusal to reveal location of witness to U.S. Marshal waived confrontation right).

More recently, the Sixth, Eighth, and Tenth Circuits have held that when a defendant threatens or coerces a potential witness out of testifying at trial, the Confrontation Clause does not prohibit the admission of the witness' prior out-of-court declarations. *See Steele v. Taylor,* 684 F.2d 1193, 1198-99, 1204 (6th Cir. 1982), *cert. denied sub nom. Kilbane v. Marshall,* 460 U.S. 1053 (1983) (where defendant procured the silence of a witness by cohabitating with her, the admission of earlier out-of-court statements that the witness made to law enforcement officials did not violate the

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[2/] The Sixth Amendment of the United States Constitution guarantees that: "In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him ..." U.S. CONST. AMEND. VI.

Confrontation Clause);[10] *United States v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980) (where defendant had coerced a witness into silence by threatening the witness' life, defendant waived his right of confrontation and his right to make hearsay objections); *United States v. Carlson*, 547 F.2d 1346, 1359-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (in drug prosecution, silencing of witness through threats of violence waived right to confront witness).

The Second and Fifth Circuits, as well as a district court in the District of Columbia, have adopted this analysis but taken it a step further. In addition to holding that a witness' prior statements may be admitted to prove the facts asserted, these courts have also concluded that such statements may be used as circumstantial evidence for the purpose of proving the additional charge of witness tampering or murder of the witness. *See United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (in drug prosecution, unsworn out-of-court statements by witness are admissible to prove charge of witness tampering where defendant through threats caused the witness not to testify at trial);[11] *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982) (where witness was murdered by the defendant for the purpose of

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[10] The *Steele* court refused to frame its holding in terms of a "waiver" analysis, explaining that "[i]t is a legal fiction to say that a person who interferes with a witness thereby knowingly, intelligently and deliberately relinquishes his right to exclude hearsay." *Steele*, 684 F.2d at 1201 n. 8. Rather, the *Steele* court premised its holding on the notion that in order to protect the adversary process, courts should not allow "a person [to] profit from his own wrong." *Id.* at 1201-202.

[11] *See also United States v. Thai*, 29 F.3d 785, 814 (2d Cir.), *cert. denied sub nom. Tran v. United States*, --- U.S. ----, 115 S.Ct. 456, 130 L.Ed.2d 364 (1994).

procuring his silence, such statements could be admitted both to prove the facts asserted as well as the additional act of murdering the witness); *United States v. White*, 838 F. Supp. 618, 621, 625 (D.D.C. 1993) (where defendant indicted for, inter alia, murder of an informant, informant's out-of-court statements to law enforcement authorities admissible at trial where the court finds defendant responsible for informant's death). Thus, these courts have adopted the proposition that a defendant indicted for, inter alia, threatening or murdering a potential witness, has--by virtue of the alleged threat or murder--waived his right to object to the admission of hearsay testimony.[12/]

Following this line of reasoning, the government here argued that because Sargent was a potential trial witness who was made unavailable by the actions of Houlihan, Fitzgerald, and Nardone, these defendants waived their rights to object to the admission of out-of-court statements made by Sargent to the police. Although the First Circuit has never confronted this particular problem, the Fifth Circuit's decision in *Thevis* is similar in many respects to the instant case and therefore provided this Court with guidance.

[12/] At first blush, such an approach might seem circular--in order to determine whether a dead witness' statements are admissible at trial to prove that the defendant killed the witness, the judge must first determine that the defendant in fact killed the witness. Nevertheless, there is ample precedent for such an approach. For example, the Rules of Evidence admit hearsay statements if made during and in furtherance of a conspiracy. FED.R.EVID. 801(d)(2)(E). In cases in which one of the charged offenses is participation in a conspiracy, the judge must nevertheless make a determination that there was, in fact, a conspiracy before co-conspirator's statements may be considered by a jury. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Richardson*, 14 F.3d 666, 668-69 (1st Cir. 1994); *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977).

In *Thevis,* the key witness in the prosecution's racketeering case against leaders of an illegal pornography operation was murdered about four months after the return of an indictment charging racketeering, and shortly before the witness was to enter the federal witness protection program. 665 F.2d at 621, 624. After the witness' death, a grand jury returned a superceding indictment which included charges of depriving a witness of his civil rights by murder in violation of 18 U.S.C.A. § 241.[13/] *Thevis,* 665 F.2d at 621, 626. When the government sought to introduce the hearsay statement of the deceased witness to prove the civil rights violation, the district court admitted the statements in evidence and the Fifth Circuit affirmed. See *Id.* at 627.

This Court agrees with the Fifth Circuit that when confrontation of a witness is impossible because of actions of the persons asserting the right, "logic dictates that the right has been waived." *Id.* at 630. To allow a defendant to benefit from murdering a witness against him would "make a mockery of the system of justice that the [Sixth Amendment] was designed to protect." *Id.* This Court, therefore, held that the waiver analysis suggested by the government was grounded in both logic and precedent and was thus applicable to the case before it.

2. Federal Rules of Evidence

The Supreme Court has noted that, while the Confrontation Clause and Federal Rule of Evidence 802,

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[13/] The statute made it a crime to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States ..." 18 U.S.C.A. § 241 (West 1969). The statute was amended in 1988 to cover "any inhabitant" of the United States or its territories. See 18 U.S.C.A. § 241 (West Supp.1993).

barring the admission of hearsay, protect the same policy interests, *Ohio v. Roberts,* 448 U.S. 56, 63-64 (1980), the rule and the constitutional right are not necessarily coterminous. *See California v. Green,* 399 U.S. 149, 155-56 (1970). Thus, despite the presence of a valid Sixth Amendment waiver, a minority of courts have held that, pursuant to the Federal Rules of Evidence, such hearsay is admissible only where the statements are also held to be sufficiently reliable. See FED.R.EVID. 804(b)(5);[14/] *United States v. West,* 574 F.2d 1131, 1135 (4th Cir. 1978) (grand jury testimony of murdered government witness sufficiently reliable that its admission did not violate the rule against hearsay); *Carlson,* 547 F.2d at 1353-55 (witness' grand jury testimony met the reliability standard of Rule 804 [b][5]).

However, in *Thevis,* the case closest to the one before the Court, the Fifth Circuit rejected such an approach, holding that Rule 804(b)(5) does not require a dual finding of waiver and reliability. 665 F.2d at 627-28, 633. Rather, the Fifth Circuit explained that where a defendant waives his right to confrontation under circumstances described above, that defendant also waives his right to object on the basis of hearsay. *Id.* at 628, 633.

Indeed, the majority of courts that have confronted the

[14/] Rule 804(b)(5) lists as an exception to the rule against hearsay, when a declarant is unavailable: A statement not specifically covered by any of the foregoing exceptions [to the hearsay rule] but having *equivalent circumstantial guarantees of trustworthiness*, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. FED.R.EVID. 804(b)(5) (emphasis supplied).

issue have held that when a defendant waives his Sixth Amendment rights by procuring the absence of a witness at trial, the accused also waives any hearsay objection to the admissibility of the witness' prior statements. *See United States v. Thai,* 29 F.3d 785, 814 (2d Cir.), *cert. denied sub nom. Tran v. United States*, --- U.S. ----, 115 S.Ct. 456, 130 L.Ed.2d 364 (1994) (if defendant waives confrontation rights by procuring silence of trial witness, he has a fortiori waived his hearsay objection as well); *Aguiar,* 975 F.2d at 47 (same); *Thevis,* 665 F.2d at 630 (same); *Balano,* 618 F.2d at 626 (same); *cf. United States v. Innamorati,* 996 F.2d 456 (1st Cir. 1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 1073, 127 L.Ed.2d 391 (1994) (holding that where out-of-court statements fall within a firmly-rooted exception to the hearsay rule--such as declarations against interest under 804[b][3]--their admission does not violate the Confrontation Clause); *United States v. Rivera-Santiago,* 872 F.2d 1073, 1086 (1st Cir.), *cert. denied sub nom. Castro-Poupart v. United States,* 492 U.S. 910 (1989) (in determining whether out-of-court statements are admissible as statements in furtherance of a conspiracy, requirements of hearsay rule and Confrontation Clause are identical). This Court adheres to the majority view. Thus, a waiver of Sixth Amendment rights also constitutes a waiver of rights under the Federal Rules of Evidence.

3. Standard of Proof

Houlihan, Fitzgerald, and Nardone argued that in determining whether to admit Sargent's prior statements, the Court should analyze the government's proffer under the "clear and convincing" evidence standard. The government, on the other hand, urged the Court to adopt a "preponderance of the evidence" standard.

The government correctly noted that the majority of

courts to address the waiver issue have adopted the preponderance standard. *See Aguiar,* 975 F.2d at 47; *Steele,* 684 F.2d at 1202; *Balano,* 618 F.2d at 629; *White,* 838 F. Supp. at 624. *But see Thevis,* 665 F.2d at 630-31 (adopting clear and convincing evidence standard).

Nevertheless, this Court thinks it significant that, where the accuracy of the evidence is important, the Supreme Court has conditioned admissibility on compliance with the clear and convincing standard. *See United States v. Wade,* 388 U.S. 218, 240 (1967) (prosecutor must demonstrate by clear and convincing evidence that in-court identification of defendant was based on observations of the suspect at times other than during the police line-up identification).[15/] Moreover, the Supreme Court has noted that the right to confront and cross-examine witnesses is a critical element of the truth-seeking process. *See Chambers v. Mississippi,* 410 U.S. 284, 295 (1973). Indeed, cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* (citation omitted). Although this right is not absolute, the denial or "significant diminution" of the right calls into question the integrity of the fact-finding process and "requires that the competing interest be closely examined." *Id.* Because here the right to confrontation is critically connected to the accuracy of the fact-finding process, the Court held that the "clear and convincing" standard is the appropriate standard for

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[15/] In other contexts, however, the Supreme Court has held that determinations under Rule 104(a) may be governed by a preponderance of the evidence standard. *See United States v. Matlock,* 415 U.S. 164, 177 n. 14 (1974) (determination of whether defendant consented to search); *Lego v. Twomey,* 404 U.S. 477, 489 (1972) (voluntariness of confession).

analyzing the waiver issue.[16/]

4. Proof of Motive

Whenever a murderer kills a person who has knowledge of the murderer's other crimes, the murderer reaps the collateral benefit of preventing the victim from testifying at a later trial. Nevertheless, none of the cases that have permitted the use of the waiver doctrine to admit hearsay testimony have gone so far as to allow the admission of such testimony on this basis alone. Thus, the fact that a murder victim is not able to testify at trial is insufficient to invoke the waiver doctrine absent some showing that the victim was in fact cooperating with law enforcement authorities and was likely to have testified at trial and that these provided a motive[17/] for the murder. Indeed, the Fifth Circuit explained

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[16/] While this Court is confident that the higher "clear and convincing" evidence standard is appropriate here, it is less clear just what this means. The standard has been criticized as imprecise, *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 873, 330 N.E.2d 161 (1975) (Quirico, J., concurring) and it is said that "proof by clear and convincing evidence is proof by a fair preponderance of the evidence--but we mean it." William G. Young, *Judge Young on Evidence for the Trial Advocate,* 92-21.07 MCLE 26 (1992). Be that as it may, neither the Supreme Court nor the First Circuit has mandated a definition and this Court therefore has tried simply to give meaningful expression in its fact-finding to the plain import of the words "clear and convincing" themselves. *Cf. United States v. Olmstead,* 832 F.2d 642, 644-46 (1st Cir.1987) (phrase "beyond a reasonable doubt" need not be defined for jury as its plain import is sufficient).

[17/] It is important to note that it is not necessary that the desire to silence a potential witness be the only motivation a defendant had for murdering that victim. Indeed, many murders are committed for a variety of reasons. Therefore, this Court ruled that where there are mixed motives for a killing, the government may establish waiver by proving by (continued...)

in a footnote in Thevis that in order to demonstrate waiver the government must prove by clear and convincing evidence both (1) that the defendant caused the witness' unavailability and (2) that this absence was procured for the purpose of preventing that witness from testifying at trial. 665 F.2d at 633 n. 17. Therefore, "even if the government proved by clear and convincing evidence that the defendant had caused the witness' absence, the hearsay evidence would still not be admissible until the government proved [by the same standard] the second part of the test." *Id.*

B. Application of the Waiver Theory to this Case

Houlihan, Fitzgerald and Nardone argued to this Court that, even under the waiver theory proffered by the government, statements made to the police by George Sargent should not be admitted in evidence because (1) the murder of Sargent did not take place "on the eve of trial"; (2) the statements made by Sargent were insufficiently reliable; and (3) the government did not present sufficient evidence that Sargent was murdered for the purpose of preventing him from testifying at trial. These arguments will be addressed individually.

1. "On the Eve of Trial"

First, the defendants argued that the waiver doctrine requires that an indictment or trial be pending at the time of the killing such that it takes place "on the eve of trial." The defendants argued that no court has ever gone so far as to admit the statements of a deceased or otherwise unavailable witness under the waiver theory where there was not a trial

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[17/](...continued)

clear and convincing evidence that the silencing of a potential witness was one of the motivations which led to the death of the victim.

or even a charge pending at the time the witness became unavailable. *See Aguiar,* 975 F.2d at 47 (one month prior to trial, witness backed out of testifying due to threats); *United States v. Mastrangelo,* 693 F.2d 269, 271 (2d Cir. 1982) (witness killed while on his way to the courthouse to testify at the trial of the defendant); *Thevis,* 665 F.2d at 623-24 (witness killed after he testified before the grand jury but before he was scheduled to testify at trial); *Carlson,* 547 F.2d at 1352-53 (due to threats, witness backed out of testifying the day before the trial was to commence).

In this instance, Sargent's murder occurred in June of 1992, almost two and a half years before the trial commenced. Nevertheless, Sargent in fact had been cooperating with a police investigation of the Houlihan-Fitzgerald drug ring, in which law enforcement authorities were attempting to gather enough evidence to prosecute the defendants.

Additionally, although Houlihan, Fitzgerald, and Nardone may technically be correct that other courts to admit such testimony did so in cases where the murders occurred "on the eve of trial," none of the cases cited by the defendants attach any legal significance to this temporal fact. Certainly the cases cited above do not preclude the admission of statements taken by victims murdered earlier in the course of police investigation. Moreover, the position argued by the defendants is simply illogical. Indeed, the defendants' approach would require this Court to engage in a time-slicing exercise which would allow the admission of statements made by declarants killed "on the eve of trial" but not those made by declarants who had only recently agreed to cooperate with the government in a pending investigation and were murdered shortly thereafter. Such an approach would have the perverse effect of encouraging criminals to knock off suspected "rats"

sooner rather than later to prevent the statements of the declarants from being used against them at a possible future trial. Therefore, the defendants' argument that there is no direct connection between the murder of Sargent and his unavailability at this trial fails as matter of fact, law, and logic.

2. Insufficient Reliability

Having failed to persuade the Court that the waiver theory may only be employed where the murder takes place "on the even of trial," Houlihan, Fitzgerald, and Nardone next argued that because the statements of Sargent were not made under oath, they are not reliable,[18] and therefore inadmissible. *See West,* 574 F.2d at 1136 (Confrontation Clause demands that out-of-court statements without "badges of reliability" be held inadmissible); *Carlson,* 547 F.2d at 1354 (statements admitted under Rule 804[b][5] must contain circumstantial guarantees of trustworthiness); *cf. Williamson v. United States,* --- U.S. ----, ---- - ----, 114 S.Ct. 2431, 2435-36, 129 L.Ed.2d 476 (1994) (because non-inculpatory parts of statements made by an arrestee are inherently unreliable, they may not be admitted at trial under Rule 804[b][3] as statements against penal interest).

As a factual matter, the defendants were correct that most of the cases that have allowed such out of court declarations dealt either with cross-examined statements or with statements made under oath. Again, however, none of these courts have assigned any legal significance to such facts. Indeed, some

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[18] Houlihan, Fitzgerald, and Nardone argued that because Sargent's statements were made after Sargent had been charged on two different occasions for drug offenses, he was obviously making the statements in order to curry favor with the police to gain leniency in his own case. *See* Trial Tr., Vol. 40, at 170.

courts have specifically held that once it has been determined that a defendant has waived his confrontation rights, even unsworn hearsay is admissible at trial. *See Thai,* 29 F.3d at 814 (statements to police admissible where defendant waived rights by procuring absence of witness); *Aguiar,* 975 F.2d at 47 (witness's unsworn and uncross-examined statements to police admissible where defendant procured witness' absence by threats); *White,* 838 F. Supp. at 625 (statements made by witness to patrolman and later memorialized in police reports admissible after finding of Sixth Amendment waiver). The Court thus found that the question of reliability is legally immaterial. Reliability was left to the jury.

3. "For the Purpose of" Preventing

Witness from Testifying at Trial

Third, and most significantly, Houlihan, Fitzgerald, and Nardone argued that the government failed to present sufficient evidence that Sargent was killed "for the purpose of" silencing him. More specifically, they argued that the government had not proved by clear and convincing evidence (a) that Houlihan, Fitzgerald, and Nardone each participated in the conspiracy to kill Sargent and (b) that each of these defendants had as at least one of his motives the desire to stop Sargent from "ratting" to the authorities.

(a) What evidence did the government proffer to indicate that George Sargent was, in fact, killed as a result of such a conspiracy by Houlihan, Fitzgerald, and Nardone? With respect to Nardone's participation in the murder, the government proffered the testimony of Michael Nelson.[19/]

[19/] Houlihan, Fitzgerald, and Nardone argued that Nelson's testimony is inherently unreliable and therefore insufficient to meet the clear and (continued...)

At trial Nelson testified that Nardone recruited him to assist him in the murder of Sargent. *See* Trial Tr., Vol. 36, at 101-02. Nelson further testified in great detail about how he and Nardone actually carried out the murder. Nelson explained that he drove the "getaway car" while Nardone walked up to Sargent and shot him three or four times. *See* Trial Tr., Vol. 36, at 112-18.

Moreover, the government proffered the testimony of Cheryl Ann Dillon, the former girlfriend of Joseph Nardone. Ms. Dillon testified that Nardone confessed his involvement in the Sargent homicide to her. *See* Trial Tr., Vol. 32, at 98-105. Dillon said Nardone claimed that Nelson was the "trigger man" while Nardone only drove the getaway car, but Nelson contradicted this testimony.[20/]

With respect to Houlihan and Fitzgerald's involvement in the Sargent homicide, the government proffered the following evidence: first, Michael Nelson testified that Houlihan and

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[19/](...continued)

convincing standard. Although it may be true that Michael Nelson appeared to be unreliable in some respects, his statements with respect to this incident were corroborated by a number of other witnesses. Thus, this Court found that in examining the totality of the circumstances, Michael Nelson's testimony--combined with the other evidence--was sufficiently reliable to constitute clear and convincing proof that Houlihan, Fitzgerald, and Nardone conspired to murder George Sargent.

[20/] Indeed, the government advanced a theory as to why Nardone might have lied to Dillon about who actually pulled the trigger. On an earlier occasion, when Nardone confessed to Dillon that he had shot and killed James Boyder Sr., Dillon gave Nardone an ultimatum--one more killing and she would terminate the relationship. Given this threat, the government argued that Nardone lied about who was the actual trigger man in the Sargent shooting in order to preserve his relationship with Ms. Dillon.

Fitzgerald wanted Sargent dead. *See* Trial Tr., Vol. 37, at 101; Vol. 36, at 101 (Nardone told Nelson that "John Houlihan and Fitzy ordered" Sargent's murder). Nelson also testified that Nardone recruited him to help him kill Sargent on behalf of "[t]he organization run by Michael Fitzgerald and John Houlihan about the cocaine business." *See* Trial Tr., Vol. 36, at 101. Moreover, Nelson testified that Nardone told him that Houlihan would pay them $5,000 if they shot Sargent. *See* Trial Tr., Vol. 36, at 111. Nelson further stated that he was, in fact, paid by John Houlihan via Nardone for his role in Sargent's death, at which point Nardone told Nelson that there would be more such jobs to come because "John and Fitzy [have] a list." *See* Trial Tr., Vol. 36, at 127. The government also offered Sargent's statements themselves to show that Sargent felt Houlihan might have been suspicious of him and might have been planning to kill him.[21/]

In light of this evidence, the Court found by clear and convincing evidence that Michael Fitzgerald, John Houlihan, and Joseph Nardone conspired to kill George Sargent.

(b) With respect to the evidence indicating that the defendants killed Sargent for the purpose of preventing him from testifying against them, the government marshalled the following evidence: first, the testimony of witnesses Pamela Flanagan,[22/] Carol McCrary,[23/] and Michael Nelson[24/]

[21/] According to the taped Sargent statements, upon hearing that two murders would be committed so that people "would get the message," Sargent became concerned with making sure Houlihan knew that he (Sargent) was loyal.

[22/] Ms. Flanagan testified that she bought cocaine from George Sargent on five or six occasions. On these occasions Ms. Flanagan would (continued...)

demonstrated that Sargent was selling drugs for John Houlihan. *See* Trial Tr., Vol. 17, at 104; Trial Tr., Vol. 9, at 144; Trial Tr., Vol. 36, at 57-60. Second, Sargent's own statements to the police that he was a distributor for the Houlihan-Fitzgerald drug ring, *see supra*, likewise supported this finding. Third, there is ample evidence in the record that Sargent had been arrested and that upon his arrest he had in fact decided to cooperate with the police.[25] *See* Report of Trooper Mark Lemieux; Tape of Conversation between George Sargent and Boston Police Detectives. Fourth, Nelson testified that Houlihan and Fitzgerald wanted Sargent "taken

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[22](...continued)

call Sargent's pager and would punch in a special code that he had previously given her. A few moments later, Sargent would arrive at her apartment with the cocaine. Trial Tr., Vol. 17, at 104, 109-11. Significantly, Ms. Flanagan also testified that on three or four additional occasions when she "beeped" Sargent, John Houlihan delivered the drugs to her. Trial Tr., Vol. 17, at 112.

[23] Ms. McCrary testified that on numerous occasions she purchased cocaine from Bud Sweeney and George Sargent. Trial Tr., Vol. 9, at 136-47.

[24] Nelson testified that he purchased cocaine from Bud Sweeney and later from George Sargent, who replaced Sweeney as distributor. When Sargent showed up instead of Sweeney, Nelson was told that either Sargent or Joe Houlihan--John's brother--would be delivering from now on. Trial Tr., Vol. 36, at 57-60.

[25] Though not part of the decision to admit Sargent's statements--because he had not then testified, *see supra* n. 8--the Court notes that there was evidence that Bud Sweeney, in the aftermath of the Sargent shooting, had a conversation with John Houlihan at the Alert Club in Charlestown in which Sweeney asked Houlihan what was going on. According to Sweeney, Houlihan replied that Sargent had to be killed because he was talking to the poli[illegible]a -

care of" both because of Sargent's unpaid gambling debts and because they believed that he was cooperating with the police. *See* Trial Tr., Vol. 36, at 110; Vol. 37, at 6, 101.

In addition to the evidence in the official record, this Court considered the notes of the prosecuting attorneys taken at the time they interviewed key witnesses in this case. Thus, Special United States Attorney Robert Peabody's notation made during his interview with Michael Nelson that "JH thought Sarge would crack" confirms this Court's conclusion that one of Houlihan's motives for killing Sargent was to silence him.

Although the Court was unable to find by clear and convincing evidence that Sargent was killed because he was talking, the Court did find by clear and convincing evidence that Sargent was killed either because he was talking or because John Houlihan feared that eventually he would talk. As indicated by his statements to Nelson, Nardone knew that this was Houlihan's motive for wanting Sargent killed. Regardless of Nardone's own intentions as a member of the conspiracy, knowledge of Houlihan's motive and a willingness to act on it equals a tacit adoption by Nardone of Houlihan's motive as his own.

Thus, with respect to the defendants Houlihan and Nardone, the government met its burden on both prongs of the *Thevis* test. The government demonstrated by clear and convincing evidence both that Houlihan ordered the defendant Nardone and the witness Nelson to kill Sargent at least in part to stop him from cooperating with the police, and that Nardone was aware of Houlihan's motive for ordering the hit. Upon these findings by clear and convincing evidence, the statements made by George Sargent to the police prior to his murder were held to be admissible against Houlihan and Nardone at trial.

The government's offer of proof with respect to Fitzgerald, however, was somewhat more complicated. Although the government did prove by clear and convincing evidence that Fitzgerald was a part of the conspiracy to kill George Sargent, the Court was not satisfied that the government's evidence was sufficiently clear and convincing to support a finding that Fitzgerald acted with the motive of silencing Sargent at a later trial. Indeed, one comment in the prosecutors' file gave the Court pause for concern. Assistant United States Attorney ("AUSA") Paul Kelly's handwritten notes of prior discussions with Nelson indicate that Nelson originally told AUSA Kelly that Michael Fitzgerald may have had a different motive for killing George Sargent than the one proffered by Nelson at trial. Indeed, Nelson appears to have told Kelly that George Sargent owed a large gambling debt to the "Murrays of Charlestown." At some point, according to Kelly's notes, Fitzgerald approached the Murrays and asked them to post bail for Bobby Levallee, another alleged foot-soldier in the Houlihan-Fitzgerald drug ring, who had recently been arrested. In consideration for posting bail, Fitzgerald offered to have Sargent killed. Kelly's notes state that, according to Nelson's original story, Fitzgerald wanted Sargent killed to "show respect for the Murrays."

Although it is not necessary that silencing of the declarant be the defendant's only motive for the killing, *see supra* n. 17, here the prosecutors' notes raise doubts as to whether the silencing of Sargent was one of Fitzgerald's motives at all. Kelly's notation that Fitzgerald wanted to kill Sargent "to show respect for the Murrays" casts doubt on Nelson's testimony that Fitzgerald wanted Sargent killed to silence him. No other evidence in the record indicates that procuring Sargent's silence was one of Fitzgerald's motives. Indeed, there is no evidence that Fitzgerald ever had knowledge of such a motive.

In *Mastrangelo,* the Second Circuit Court of Appeals stated that "[b]are knowledge of a plot to kill [a witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver." 693 F.2d at 273-74. Without much elaboration, the Second Circuit seemed to indicate that even those members of a conspiracy who do not directly participate in the killing or who do not have direct knowledge of the purpose of the killing may nevertheless be held to have waived their constitutional and hearsay objections. Under this interpretation, a defendant such as Fitzgerald could be held to have waived his Sixth Amendment rights simply by being a part of a conspiracy to murder where one of the members of the conspiracy had the motive of silencing a witness. *But see White,* 838 F. Supp. at 618 ("[m]ere failure to prevent the murder, or mere participation in the alleged drug conspiracy at the heart of this case, must surely be insufficient to constitute a waiver of a defendant's constitutional confrontation rights."). Because the waiver of a constitutional right is personal, this Court adopted the rule of *White* and rejected that of *Mastrangelo,* holding that a waiver cannot be accomplished through principles of agency. At a minimum, the prosecution must prove by clear and convincing evidence that each member of the conspiracy at least knew that one of the motives for the killing was the silencing of a potential witness. Others who join a conspiracy to kill for their own personal reasons, do not, because of their relationship with the other conspirators, waive their constitutional rights. Thus, the statements of George Sargent, while admitted against Houlihan and Nardone, were not admitted against Fitzgerald.

C. What Portions of the

Sargent Statements were Admitted?

Adoption and application of the waiver theory, however,

did not end this Court's analysis. Indeed, only portions of Sargent's statements were ever disclosed to the jury. Two principles guided the Court's determinations as to redaction.

First, all of the courts that have adopted the waiver analysis have held that admissibility is limited to such out-of-court statements as would have been competent and admissible evidence had the declarant been able to testify in person. *See, e.g., White,* 838 F. Supp. at 625. This Court followed this same limitation and redacted all portions of the Sargent statements which were not factual in nature and which were not grounded on Sargent's personal knowledge or did not constitute an admission or a statement of a co-conspirator. FED.R.EVID. 801(d)(2) & 801(d)(2)(E).

The Court then made a second pass through the Sargent statements to edit out all portions which either directly or through innuendo offended the teaching of *Bruton v. United States,* 391 U.S. 123 (1968) (admission of statements by codefendant that implicate other defendants at joint trial constitutes prejudicial error).[26/]

[26/] As the First Circuit has recently had occasion to note, given the dictates of *Richardson v. Marsh,* 481 U.S. 200 (1987), this Court may have accorded too broad a sweep to Bruton principles. *See United States v. Smith,* 46 F.3d 1223, 1228- 29 (1st Cir. 1995). This Court respectfully acknowledges the point. The difference in approach is explained, at least in this case, not through any difference in the interpretation of the controlling legal framework, but rather in the difference in approach and function of trial and appellate courts. It is axiomatic that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986); *United States v. Barnett,* 989 F.2d 546, 560 (1st Cir.), *cert. denied,* --- U.S. ----, 114 S.Ct. 148, 126 L.Ed.2d 110 (1993). Thus *Bruton* and its progeny mark the "fairness floor." Fall below it, and a retrial necessarily must ensue with all its attendant social and personal costs, as basic justice was not done. It is no

(continued...)

In making this determination, the Court was guided by its discussions with the parties prior to trial. At that time, confronted by the government's motion to admit the Sargent statements, as well as the motions of certain defendants for severance, the Court and the parties thoroughly explored the implications of a broad reading of *Bruton* (a step that tends to maximize fairness for defendants) and a joint trial of as many counts as possible (a step that conserves scarce resources).[27/] The result reached--a joint trial of six defendants coupled with a broad reading of Bruton principles-- was one the government accepted prior to trial in order to avoid further severance rulings. Having agreed to structure the case in this manner, the government was thus unable later to convince the Court that Sargent's statements ought be admitted against Fitzgerald. The Court therefore struck portions of the Sargent statements which the government had steadfastly urged be admitted--a point to which it will be necessary to return.

D. The Defense Response

Having exhausted their efforts to keep the Sargent statements from the jury, Houlihan and Nardone preserved

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[26/](...continued)

disrespect to appellate courts to note that, in the great majority of cases, they must ask themselves, not what they would have done in the first instance, but rather whether the trial record is "good enough." The trial judge, of course, tries constantly to rise above the "fairness floor" and, weighing all the competing interests, reach for justice and accord the parties the fairest trial humanly possible. So here.

[27/] *See United States v. O'Bryant,* 998 F.2d 21, 25 (1st Cir. 1993) (joint trials help both to prevent inconsistent verdicts and to conserve judicial and prosecutorial resources); *United States v. Emberson,* 1994 WL 131729, at *1 (10th Cir. 1994); *United States v. L'Allier,* 838 F.2d 234, 240-42 (7th Cir. 1988).

their rights and, as was their prerogative, set sail on a strikingly different tack. They then claimed that the Court's editing unfairly bowdlerized the Sargent statements with the effect of making them more inculpatory of Houlihan than would otherwise be the case. Houlihan and Nardone thus sought to offer the Sargent tape recording in its entirety.

No doubt counsel for Fitzgerald and Herd held their breath at this point, ready to object had the government remained silent, since the full tape inculpates both Fitzgerald and Herd directly, by name, and in ways that offend the core values of *Bruton* even as explicated by *Richardson v. Marsh*, 481 U.S. 200 (1987). The government, as expected,[28] leapt into the fray to raise a variety of hearsay and related objections. Because it would further prolong this already prolix opinion to work through each of these spats, it suffices here summarily to indicate the issues raised and resolved, leaving the rest to the trial record but expanding on the two points that occasioned the Court's greatest concern.

The government first argued that, as the Court had already ruled that Houlihan and Nardone waived their rights to confront Sargent or raise hearsay objections to his testimony, they likewise waived any right to introduce additional portions of the Sargent statements. The Court disagreed. It is one thing to rule that a defendant has waived his rights to object to the admission of certain evidence. But the objection here implicated an entirely different set of values--including

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[28] The government, of course, feared a mistrial as to certain defendants should *Bruton* problems not be avoidable. Indeed, this Court later granted a partial mistrial upon motion of Fitzgerald as to certain counts after concluding that a certain conversation at Dapper Dan's bar was not in furtherance of one the conspiracies charged and thus could not be admitted against Fitzgerald. This mistrial, as the government rightly feared, followed from a broad reading of *Bruton* principles.

those undergirding the Compulsory Process Clause of the Constitution. Whatever Houlihan and Nardone may have done, they may not on that account be estopped from proffering competent, admissible evidence on their own behalf.

With that settled, Houlihan and Nardone resumed the offensive, arguing that, at least as to the portions of the Sargent tape originally proffered by the government but redacted by the Court, the government was itself now judicially estopped from objecting to their admissibility. Not so. The concept of judicial estoppel comes into play only where the government has obtained some advantage through its original position. *See Desjardins v. Van Buren Community Hosp.*, 37 F.3d 21, 23 (1st Cir. 1994); *Patriot Cinemas v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987). Here it did not. The Court rejected the government's proffer of the disputed portions. Consequently, the government had the right now to interpose any appropriate objections when they were offered by the defense.

Houlihan and Nardone then offered the remainder of the Sargent tape under FED.R.EVID. 106.[29/] The Court rejected the proffer because the disputed portions were sufficiently segregable that FED.R.EVID. 106 did not carry them into evidence.

Houlihan and Nardone next offered the remainder of the Sargent tape under the innominate exception to Rule 804. FED.R.EVID. 804(b)(5). "Unavailability" under Rule 804, however, is defined to exclude circumstances where "absence

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[29/] That rule states: "When a ... recorded statement or part hereof is introduced by a party, an adverse party may require the introduction at that time of any other part ... which ought in fairness to be considered contemporaneously with it." FED.R.EVID. 106.

is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or certifying"--a matter pointed out to me by my students in evidence class at Boston University School of Law. By its express terms, therefore, FED.R.EVID. 804(b)(5) is inapposite. The relevant exception is FED.R.EVID. 803(24), where the availability *vel non* of the declarant is immaterial. As both exceptions have identical reliability limitations, however, it was necessary to consider the argument of Houlihan and Nardone under that exception.

Houlihan and Nardone argued that the Court's findings of "clear and convincing" evidence--which findings are based in part on the Sargent tape (indeed on certain portions of the tape that are here most hotly disputed, *see supra*) -- necessarily resulted in a finding of "circumstantial guarantees of trustworthiness" which warranted admissibility under FED.R.EVID. 803(24). This logic is flawed. The Court found by clear and convincing evidence on the totality of the trial record before it at the moment of decision that Houlihan, Fitzgerald, and Nardone conspired together and carried out the murder of George Sargent. As the Court has been at pains to point out, *see supra*, it made no findings as to the reliability of Sargent. It was not required to. *See Thai,* 29 F.3d at 814; *Aguiar,* 975 F.2d at 47; *White,* 838 F. Supp. at 625. What is more, while certain discrete redacted portions of the Sargent tape may have been said to bear on material facts, FED.R.EVID. 803(24)(A), the tape was not "more probative on the point for which it [was] offered than any other evidence which the proponent[s] [could have] procure[d] through reasonable efforts," nor was it in "the interest of justice" to admit the remainder of the tape. FED.R.EVID. 803(24)(B). After all, had Houlihan and Nardone not orchestrated the murder of Sargent, he would have been available for cross-examination at trial.

During the taped interview, the following exchange occurred: Det. Harris: After--shortly after the homicide, did you have a conversation with Houlihan again about Boyden, Sr. being killed? Sargent: Yeah. I--I mentioned it, asked him about Billy Hurd (sic). I said, did you know him, you know, and he goes, yeah, I knew him. I says--I says, you know, I, you know, the papers are making it a drug war, I want to make sure he knows I'm with you guys. He says, oh, yeah, he knows that you're with us so I took--took that to mean that he knew that he was going to kill these--Boyden. Trial Exh. 250; Memorandum of Law in Support of the Government's Motion in Limine to Admit the Statements of George Sargent ("Government's Br."); Exh. B, at 9-10; *see also* Trial Exh. 250 (tapes); Trial Exhs. KZ, LA (transcripts marked for identification). Houlihan and Nardone argued that this statement is relevant and exculpatory as it tends to point to Herd as the murderer of Boyden Sr., a conclusion that may suggest a reasonable doubt as to the government's theory that it was Nardone who carried out that murder.

The government objected.

The Court sustained the objection because--while the statement may be both relevant and exculpatory--it is inadmissible hearsay, FED.R.EVID. 802, offered through an out-of-court declarant as to whom there is no showing of personal knowledge of the facts asserted. In short, the Court found that Sargent was not a competent witness as to these matters. FED.R.EVID. 601.

The tape also records: Det. Harris: All right. Mr. Sargent, just before we started this taping, we were discussing several incidents that have happened, and being specific, I'm talking about homicides that have occurred in Charlestown and, being specific again, more recently in the last couple of months. I would like for you, in your own words, please, if

you would, tell us of the first homicide that you recail that we spoke about earlier and, if you would, in your own words, would you tell us what happened? Sargent: Just--Jimmy--I was going to say Muffin, you know. James Boyden comes (Unintelligible) He was down on--around Monument Street trying to--taking over a territory that was Mikey Fitz's girlfriend's territory so Fitzy went and gave him a warning to get out of there and not to do--sell drugs there or--but he didn't heed the warning. So he went down the--the flower shop where Fitzy was working, called Fitzy a piece of shit. Fitzy gave him a beating, and I talked to Fitzy the day after, and he said, I'll just have to kill him and a couple weeks later, he was dead. Government's Br., Exh. B, at 3-4.

Houlihan and Nardone argued that this is a statement against Fitzgerald's penal interest, FED.R.EVID. 804(b)(3).[30/] Here, at least as to the communication from Fitzgerald to Sargent, Houlihan and Nardone were correct. Fitzgerald was "unavailable" due to his Fifth Amendment privilege to remain silent at trial. FED.R.EVID. 804(a)(1). What is more, this statement has particularized guarantees of trustworthiness as to the identity of the person who ordered Boyden Jr.'s death in view of the extensive trial record on this point.

Houlihan and Nardone, however, were not charged with killing Boyden Jr. Nevertheless, they argued that the statement was a crucial part of their defense to the charge that they had a hand in killing Sargent. For, they argued, once Fitzgerald had confessed to the murder of Boyden Jr. to

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[30/] The phrases "admission" and "co-conspirator statement" were also bandied about. Neither of these hearsay exceptions helped the defendants, however, since both depend on the declarant's being the party opponent. Here, Fitzgerald was a co-defendant.

Sargent, who but Fitzgerald would have had a greater motive for killing him once it became suspected that he was talking to the police? There is force to this argument, and the Court agreed that the statement was relevant.

Once again, the government objected.

The Court sustained the objection because, while "totem pole" hearsay is admissible if each "totem" on the "pole" qualifies as a hearsay exception, FED.R.EVID. 805, the communication from Sargent to the police which is the subject of the tape is an out-of-court declaration offered for the truth of the matter asserted, i.e., that Sargent was accurately and truthfully recounting what Fitzgerald had said. It is, therefore, inadmissible hearsay. FED.R.EVID. 802.

This is the statement that arguably came closest to admissibility under 803(24) and the Court carefully considered that issue. The Court rejected the proffer under that exception for the reasons already stated and notes that the circumstantial guarantees of trustworthiness here run to the reliability of Fitzgerald's confession, not to the reliability of Sargent--caught with a large quantity of cocaine, flipped by the police, and seeking to curry favor as an informant--accurately perceiving and reliably reporting whatever it was that Fitzgerald said to him, if anything.

Failing in their multifaceted attempt to have the redacted portions of the tape admitted substantively, Houlihan and Nardone, noting that admission of the edited Sargent statements opens him up to impeachment in the manner of any live witness, FED.R.EVID. 806, argued that redacted portions of the tape ought to be admitted, not for the truth of the matters asserted, but as prior inconsistent statements. The Court rejected these proffers on the grounds that they were too convoluted, collateral, or cumulative to be admitted and because the Court had afforded adequate leeway to counsel to

"cross-examine" Sargent's reliability through their cross-examination of the police witnesses attesting to the statements. *Cf. United States v. Ovalle-Marquez,* 36 F.3d 212, 217 (1st Cir. 1994) (trial judge has discretion to control the scope of cross- examination), *cert. denied,* --- U.S. ----, 115 S.Ct. 947, 130 L.Ed.2d 891 (1995); *United States v. Akitoye,* 923 F.2d 221, 225 (1st Cir. 1991) (same).

III. CONCLUSION

It is for these reasons that the Court handled the Sargent statements as it did.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1614

UNITED STATES OF AMERICA,
Appellee,
v.
JOHN HOULIHAN,
Defendant, Appellant.

No. 95-1615

UNITED STATES OF AMERICA,
Appellee,
v.
JOSEPH A. NARDONE
Defendant, Appellant.

No. 95-1675

UNITED STATES OF AMERICA,
Appellee,
v.
MICHAEL D. FITZGERALD
Defendant, Appellant.

Before
Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
Selya, Cyr, Boudin, Stahl and Lynch, Circuit Judges.

ORDER OF COURT
Entered: September 20, 1996

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing and, the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

William H. Ng

Clerk

[cc: Messrs. Rankin, Lehman, Shapiro, Murray, Nixon, Libby, Hoffman, Leoney, Kelly, Goodman and Chaitowitz]